No. 11, ORIGINAL.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

IN EQUITY.

THE STATE OF LOUISIANA, *Complainant*,

vs.

THE STATE OF MISSISSIPPI, *Defendant*.

BRIEF OF THE ARGUMENT FOR THE DEFENDANT.

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I.

Acts of Congress Upon Whose Construction this Case Depends.

During the period beginning with 1812 and ending with 1819 the Congress of the United States carved out of those portions of the public domain known as the Louisiana Purchase and the Mississippi Territory the States of Louisiana, Mississippi and Alabama, whose continuous sea-front extends from the west line of Florida to the mouth of the Sabine river, a distance, by the general trend of the coast, of about 623 statute miles, Alabama possessing about 52, Mississippi about 71, and Louisiana about 500 statute miles. When the acts in question are read consecutively there can be no escape from the conclusion that they were enacted as parts of a common design, of a common purpose which they

were the means of carrying into effect, so far as the deliniation of the continuous sea-front described above is concerned. The State of Louisiana was admitted into the Union by the Act of Congress (Stat. at L., Vol. 2, p. 701) approved April 6, 1812, in the preamble of which the boundaries of said State are described as follows: "Whereas, the representatives of the people of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the 30th day of April, 1803, between the United States and France and contained within the following limits, that is to say: Beginning at the mouth of the River Sabine, thence by a line drawn along the middle of said river, including all islands to the 32d degree of north latitude; thence along the said parallel of latitude to the Mississippi River; thence down the said river to the River Iberville (or Bayou Manchac), and from thence along the middle of said river and Lake Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded *by said gulf to the place of beginning, including all islands within* THREE *leagues of the* COAST." By the Act of Congress (Stat. at L., Vol. 3, p. 348), approved March 1, 1817, the inhabitants of the western part of the then Mississippi Territory were authorized to form for themselves a State constitution, and to be admitted into the Union with the following boundaries: "Beginning at the River Mississippi at a point where the southern boundary line of the State of Tennessee strikes the same; thence along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of the county of Washington (Alabama); thence due south to the Gulf of

Mexico; *thence westwardly, including all islands within* SIX *leagues of the* SHORE *to the most southern junction of Pearl River with Lake Borgne;* thence up said river to the 31st degree of north latitude; thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning." The State of Alabama was admitted into the Union by the Act of Congress (Stat. at L., Vol. 3, p. 489), approved March 2, 1819, which provides "That said State shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido River; thence, east, to the western boundary line of the State of Georgia; thence, along said line to the southern boundary line of the State of Tennessee; thence, west, along said boundary line to the Tennessee River; thence, up the same to the mouth of Bear Creek; thence, by a direct line, to the northwest corner of Washington county; thence, due south, to the Gulf of Mexico; *thence, eastwardly, including all islands within* SIX *leagues of the* SHORE, *to the Perdido River;* and thence, up the same to the beginning." The acts defining the boundaries of Mississippi and Alabama are in almost identical terms, so far as the sea-front is concerned; and their deviation from the terms of the Act defining the sea-front of Louisiana is represented by the use of the word "*shore*" for "*coast*" (convertible terms), and by the phrase, "all islands within *six* leagues of the *shore*" instead of the phrase, used in the Louisiana Act, of "all islands within *three* leagues of the *coast.*" The controversy embodied in this case has arisen out of a conflict of view as to the manner in which the line defining the sea-front of Mississippi on the

south should be adjusted to the line defining the sea-front of Louisiana on the east, and northeast, at a point opposite the most eastern mouth of Pearl River, *where one side of an archipelago of islands lies near the mainland of Louisiana.*

II.

The Foregoing Acts Must be Construed in Pari Materia.

The problems which the Court will be called upon to solve in this case grow out of an apparent conflict or repugnancy between the statutes in question, when applied to the exceptional conformation of the territory, whose boundaries are to be defined. In order to overcome that difficulty it will be absolutely necessary for the Court to apply that all-important rule of construction which provides that, "In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered, but where there are several statutes *in pari materia*, they are all, whether referred to or not, to be taken together and one part compared with another in the construction of any material provision." Enc. of Law (2d ed.), Vol. 26, p. 620. In *Alexander* v. *Alexandria*, 5 Cranch, p. 8, this Court, speaking through Marshall, C. J., said: "Without deciding this question as depending merely on the original law, it is to be observed that acts *in pari materia* are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, *if a subsequent act on the same subject*

affords complete demonstration of the legislative sense of its language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to the courts in expounding the provisions of the law." In that case an act of 1779 was construed in the light of an act passed seventeen years thereafter. In *Patterson* v. *Winn*, 11 Wheat., 386, it was said: "The land law of Georgia is comprised under several statutes, passed at different periods, varying and modifying the system occasionally, as policy required. But all being *in pari materia*, are to be looked to as one statute, in explaining their meaning and import." In *Pollard* v. *Kibbe*, 14 Pet., 366, it was said: "But if the construction of the act of the 26th of May, 1824, is doubtful, as it is admitted to be, the act of the 2d of July, 1836, is entitled to great weight in aiding to remove that doubt. * * * There is a proviso declaring that this act shall not interfere with or affect the claims of third persons. But giving to this proviso its full force and effect, the enacting clause is a legislative construction of the act of 1824, and locates the patent thereby to be issued upon the lot now in question. *They are acts in pari materia, and are to be construed together, and in such a manner, if the language will reasonably admit of it, as to permit both acts to stand together and remain in full force.* IT IS NOT TO BE PRESUMED THAT CONGRESS WOULD GRANT OR EVEN SIMPLY RELEASE THE RIGHT OF THE UNITED STATES TO LAND CONFESSEDLY BEFORE GRANTED. This would only be holding out inducements to litigation." In *United States* v. *Freeman*, 3 How., 563, it was said: "The correct rule of interpretation is,

that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. (Dong., 30; 2 Tenn. Rep., 387, 586; 4 Maul & Setw., 210.) *If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute* (*Lord Raym.*, 1028); *and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.* (*Morris* v. *Mellin*, 6 Barn & Cress., 454; 7 Barn & Cress., 99.) Wherever the words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words. (*Winbish* v. *Tuibois*, Plowd., 57.) A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the latter. * * * This Court has repeatedly, in effect, acted upon the rule, and there may be found, in the reports of its decisions, cases under it like the cases which have been cited from the reports of the English courts. In 4 Dall., 14, '*The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.*'" That principle was expressly confirmed in *Cope* v. *Cope*, 137 U.S., 687, wherein it was said: "These several acts of Congress, dealing as they do with the same subject-matter, should be construed not only as expressing the intention of Congress at the

dates the several acts were passed, *but the later acts should also be regarded as legislative interpretations of the prior ones. United States* v. *Freeman*, 3 How., 556, 564; *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall., 323." In *Converse* v. *United States*, 21 How., 463, it was said: "It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the Government, these various laws on the same subject-matter must be taken together and construed in connection with each other. And we should defeat instead of carrying into execution the will of the law-making power, if we selected one or two of these acts, and founded our judgment upon the language they contain, without comparing and considering them in association with other laws passed upon the same subject." In *United States* v. *Walker*, 22 How., 299, it was said: "All of these additional compensation acts are *in pari materia* with the several acts prescribing the sources of emolument, and the whole must be construed together. When they are so considered, there is no such repugnancy as is supposed by the defendant." In *Ryan* v. *Carter*, 93 U. S., 78, it was said: "There is no known rule of law requiring the court to interpret this proviso *according to the literal import of the words employed when the evident intention of the legislature is different.* It may be that the words taken in their usual sense, would exclude the case of Dodier; but if it can be gathered, from a view of the whole law, and others *in pari materia*, that they were not used in that sense, and they admit of another meaning in harmony with the general scope of the statute, it will be adopted as the declaration of the will of Congress on

the subject. * * * If there were any doubt remaining about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia*. Congress passed various laws, from time to time, respecting the claims to lands in the Territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land system, are all *in pari materia*, and to be looked to as one statute in explaining their meaning." In *Vane* v. *Newcombe*, 132 U. S., 220, it was said: "It is a rule of interpretation recognized by the Supreme Court of Indiana, in *Stout* v. *Grant County*, 107 Ind., 343, 348, that 'in cases of doubt or uncertainty, acts *in pari materia*, passed either before or after, and whether repeated or still in force, may be referred to in order to discern the intent of the legislature in the use of particular terms, or in the enactment of particular provisions; and, within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose.'"

Thus it has been settled by the rules of construction which this Court has prescribed for itself in ascertaining the intention of Congress, that "in cases of doubt or uncertainty," or apparent conflict or repugnancy, it will, (1) construe all of the acts relating to the same subject-matter together, and in such a manner, if their language will reasonably admit of it, as to permit them all to stand together and remain in full force; (2) that "if a subsequent act on the same subject affords complete demonstration of the legislative sense of its language, the rule which has been stated, requiring that *the subsequent should be incorpo-*

rated into the foregoing act, is a direction to the courts in expounding the provisions of the law"; (3) that "if a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, *they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute*"; (4) that acts of Congress, dealing "with the same subject-matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones"; (5) that "*it is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted. This would be only holding out inducements to litigation.*" When a series of acts relating to one subject-matter are thus construed together, as a connected whole, *the Court must presume that the entire will of Congress is not expressed until the last word of the last act is uttered.* The completed intent of the legislature as embodied in the subsequent act or acts is then "incorporated into the foregoing act," and thus becomes "a direction to the courts in expounding" its meaning. It thus follows with the certainty of mathematical demonstration that he who takes under the first act takes nothing more than Congress *intended to grant*, after such intent has been drawn from the provisions of all the subsequent acts *in pari materia*, because, in the words of Marshall, C. J., the pro-

visions of the subsequent act must be "incorporated into the foregoing act." Under that rule of construction it is logically and legally impossible for the party who claims under the first act to contend that he is divested of a vested right by the ascertainment of the real intent of the legislature from subsequent acts, for the simple and conclusive reason that the judicial ascertainment is that what he is pleased to call a vested right was never vested in him at all. In the present case Louisiana cannot set up even a moral claim of that character because, as will appear hereafter, she has never until very recently exercised any real sovereignty over the area in question; and because the parties to whom she has attempted to convey certain parts of it through her agent, the Lake Borgne Basin Levee District, cannot pretend to be *bona fide* purchasers, as they were notified of the infirmity of the title of their grantor in quit claim deeds that recite upon their face "that should the said title be subsequently declared void, the said board shall not reimburse to the purchaser any sum whatever."

III.

A Construction to be Avoided Which Will "Produce Inequality and Injustice."

In connection with the foregoing the Court must apply the equally important rule which declares "that, where a particular construction of a statute will occasion great inconvenience *or produce inequality and injustice*, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 37; *Wilson* v. *Rousseau*, 4 How., 646, 680; *Bloomer* v. *McQuewan*, 14 How., 539, 553; *Blake* v.

National Banks, 23 Wall., 307, 320; *United States* v. *Kirby*, 7 Wall., 482, 486." *Knowlton* v. *Moore*, 178 U. S., p. 77. In *United States* v. *Kirby*, 7 Wall., 482, the court said: "All laws shoud receive a sensible construction. General terms should be so limited in their application as not to lead *to injustice, oppression, or absurd consequence.* It will always, therefore, be presumed that the legislature intended *exceptions to its language*, which would avoid results of this character. *The reason of the law, in such cases, should prevail over its letter.*"

In order to understand the controlling reason, the dominant idea underlying the three acts in question considered as one connected whole, the Court must take into consideration the physical conformation and relative extent of the sea-front, which they attempted to apportion, as equally as possible, among the States of Louisiana, Mississippi, and Alabama. It is well settled that courts will take judicial notice of the prominent geographical facts and features of the country. "It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions." The Apolion, 9 Wheat., 362. "We are supposed to know judicially the principal features of the geography of our country, and as a part of it, what streams are public navigable waters of the United States." The Montello, 11 Wall., 411. A court will also take judicial notice of the positions of islands off the coast of a State. *State* v. *Wagner*, 61 Me., 178. The Court has therefore complete judicial knowledge of the geography of the sea-front in question, and of the positions of the islands adjacent thereto, to whose partition

the three related acts must be applied. When, in the light of that geographical knowledge, the court perceives that to the States of Mississippi and Alabama were given, *in identical language*, all islands within *six* leagues of the shore," and to Louisiana "all islands within *three* leagues of the coast," the conclusion is irresistible that the wider zone of islands given to the States first named was intended to compensate for the fact that *the latter has more than four times as long a sea-front as both combined.* Everything indicates the intention of Congress to give to each of the three States in question the islands directly in front of it; and to the first two a zone of islands twice as wide as that given to the latter for the reason stated. The rule of construction which provides that statutes shall be so construed that they shall not "produce inequality and injustice" is based upon the assumption that legislatures always intend by their acts to establish equality and justice. In this case full justice and equality could not be accorded either to Mississippi or Alabama, even by the grant of the wider zones of islands, because of the far more extended sea-front of Louisiana. In view of that fact the Court cannot countenance the contention of that State which demands that the acts in question shall be so construed as to give to her not only all islands adjacent to her hundreds of miles of sea-front on the south, but all those on the east *which extend at least half-way across the only sea-front of Mississippi.* Against that grossly unequal and unjust contention the State last named simply claims "all islands within six leagues of the shore to the most southern junction of Pearl River with Lake Borgne," as the act of Congress

provided. The Court should thus keep constantly in mind the fact that it cannot support the contention of Louisiana without sustaining the gross inequality and injustice which would result from giving to that State, in addition to the islands on her vast southern sea-front, islands on the east which extend half-way across the only sea-front of Mississippi. If complainant should attempt to contend that there is no such doubt and uncertainty involved in the construction of the acts in question as will justify the application of the rule of *in pari materia*, defendant can answer through the mouth of Mr. Edgar H. Farrar, the leader of the New Orleans bar, who, in testifying in behalf of complainant, has said: "I very much doubt whether the Congress, individually or collectively, even the drafters of this act, had, at that time, any definite geographical knowledge of this locality, and that the act was drawn with their usual carelessness which characterizes the drafting of all important legislation in American legislative bodies, and that these acts were not referred to the topographical authorities of the United States for examination, and that they went, as most of our legislation, by happy-go-lucky guesswork. That is the history, in my judgment, of the conflict between these two States. Because of the ignorance of the men who drew those acts." If Mr. Farrar is correct in his surmise as to the cause of the conflict in question, that is the greater reason why this Court, by an application of the scientific rules of construction to these acts considered as one connected whole, should work out a result which will prevent inequality and injustice.

The existence of an apparent conflict or repugnancy

between the acts in question complainant admits, when in Par. 24, she avers that the elimination of her fanciful theory of a deep water channel boundary "*would cause the limits of the two States to conflict and overlap.*" Complainant, by copying into the record a quotation from Mr. William Darby, surveyor, map-maker and historian of that State (1806–1817), has emphasized the doubt as to what the statutes admitting the States in question mean. The statement is also important in that Mr. Darby recognized the application of the doctrine of *in pari materia* to this very contention. He said:

> "The islands of Malheureux, Marrianne and Cat island, are included in the bounds assigned to both the States of Louisiana and Mississippi. There must have been some oversight in framing the respective acts, which marked the possessions of each State." Rec. p. 1140.

The conflicting claims of the States as to possession, sovereignty and jurisdiction, supported by the testimony of many witnesses, as well as conflicting laws, history, and geography, certainly raise such a doubt as to call for the application of the doctrine contended for by defendant.

IV.

A hopeless attempt to extend the rule of international law as to river boundaries, beyond the estuaries of the river, to the open waters of the Gulf of Mexico.

In her bill of complaint Louisiana has based her inequitable and unjust claim upon a rule of international law concerning river boundaries, which can have no possible application to this case. In paragraph 2, the allegations are:

"That according to the foregoing description, the eastern boundary of the State of Louisiana was formed by the Mississippi River, beginning at the northeast corner of said State and extending south to the junction of the said river with the River Iberville (now known as Bayou Manchac), and thence extending eastwardly through the lower end of the Amite River, through the middle of Lake Maurepas, Pass Manchac, and Lake Pontchartrain, and in order to reach the Gulf of Mexico its only course was through the Rigolets, into Lake Borgne, *and thence by the deep water channel* through the upper corner of Lake Borgne, following *said channel*, north of Half Moon Island, through Mississippi Sound to the north of Isle à Pitre, through the Cat Island *channel*, southwest of Cat Island, into the Gulf of Mexico." In paragraph 28 the allegations are: "Your orator further avers that where contiguous states or countries are separated by water, it is, and always has been, the *custom* to regard the *channel* as establishing the boundary line of such states, and that the State of Mississippi has itself recognized this principle in the description of its territorial limits as found in the second article of its own constitution adopted November, 1890." [Reference is thus made to a "*custom*." Counsel have not ventured to state that there is or ever was such a *rule* of international law.] In the prayer of the bill (p. 19) the statement is "that the boundary line dividing the States of Louisiana and Mississippi, in the waters between the said States to the south of the State of Mississippi, and to the southeast of the State of Louisiana is *the deep water channel*." Thus an attempt has been made to incorporate into the statutes in question a rule of inter-

national law which, if applicable, *would entirely change the water boundary of Louisiana as expressly defined by Congress in the act of April 6, 1812, admitting her as a State.*

There is a well defined international rule which provides that where there is more than one channel *in a* RIVER *dividing conterminous states*, the deepest channel is the mid-channel or thalweg for the purposes of territorial demarcation. According to Grotius: "A river that separates two empires is not to be considered barely as water, but as water confined within such and such banks and running in such and such channel." De Jure Belli ac Pacis, II, c. 3, Sec. 17. According to Vattel: "If, of two nations inhabiting the opposite banks of the river, *neither party can prove that they themselves, or those whose right they inherit, were the first settlers in those tracts*, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case the dominion of each will extend to the middle of the river." *Droit des Gens*, Bk. 1, c. XXII, Sec. 26. *The Court will here observe that this general rule has no application to a case governed by a special rule established by convention, or by a special right based on prior possession.* Sir Travers Twiss has well said that "Grotius and Vattel speak of the *middle of the river* as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the *mid-channel*. If there be more than one channel of a river, the deepest channel is the mid-channel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of

the deepest depression of its bed. * * * The islands on either side of the mid-channel are regarded as appendages to either bank." After thus stating the general rule, *in the absence of convention or special circumstances*, the same author says: "Such is the general law, but by treaty the mid-channel may be made the water boundary, yet all the islands in the river belong to one power." Hall says that where the boundary "follows a river, *and it is not proved that either of the riparian states possess a good title to the whole bed*, their territories are separated by a line running down the middle, except where the stream is navigable, in which case the center of the deepest channel, or, as it is usually called, the thalweg is taken as the boundary." Int. Law, p. 127. Halleck says: "But where the river not only separates the conterminous states, but also their territorial jurisdictions, the thalweg, or middle channel, forms the line of separation *through the bays and estuaries through which the waters of the river flow into the sea*. As a general rule this line runs through the middle of the deepest channel, *although it may divide the river and its estuaries into very unequal parts*." Int. law (Baker ed.), Vol. 1, p. 171. It thus appears that the rule in question is confined to the *mid-channel or thalweg of rivers*, or to a mid-channel which forms the line of separation through the bays and estuaries *through which the waters of the river flow into the sea*. The moment the sea is reached, or a body of water which is a part of the sea, the rule is at end. So it is beyond all doubt that the rule invoked by complainant as to the flow of the mid-channel or thalweg of the River Iberville (now known as Manchac) to the sea through Lakes Maurepas, Pontchartrain and the Rigolets,

expires by its own limitation when such mid-channel reaches Lake Borgne which, in contemplation of the rule, is the open sea, a part of the waters of the Gulf of Mexico. Certainly it was so regarded in the act of April 6, 1812, admitting Louisiana whose terms are: "thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico." The attempt to extend the rule beyond the estuaries of the river into the open sea, that is, into the open waters of the Gulf of Mexico, cannot be supported either by reason or authority. Not by reason, because the wide expanse of water, unconfined between banks, utterly fails to serve as a boundary; not by authority, because there is no precedent for such an extension of the rule in any work on international law.

The attempt made by counsel for the United States, in the Alaskan Boundary Case, to apply the doctrine of the thalweg to the narrow and sharply defined channels in the long and river-like fjord "arm of the sea," or estuary known as "Portland Canal" was in perfect harmony with the foregoing authorities. That attempt rested upon the proposition that "Portland Canal" was as much an estuary as if a river system flowed into it; that because this long and narrow arm of the sea, with its rocky and abrupt shores, was in form like a river, that it came within the reason of the rule which applies the doctrine of the thalweg to the channels of rivers. While admitting the application of the doctrine Lord Chief Justice Alverstone was careful to limit it. In replying to Mr. Taylor, he said: "The doctrine of the thalweg applies, but I am bound to say I do not think that even David Dudley Field himself—and Dudley Field

was a very great authority—meant to say what you put upon him, because he refers to Bluntschli, *who is there dealing with rivers.*" The application of the doctrine to the channels of Portland Canal was recognized only because that canal was in physical structure like a river with narrow channels and rocky and abrupt shores. Such a recognition cannot, of course, give countenance to the idea that the doctrine can be extended, *beyond the mouth of an estuary or an arm of the sea*, into the open sea itself where there are no banks between which channels can flow. The attempt made here by complainant to extend the doctrine to a channel in the open sea is without precedent or reason to support.

Whenever it is necessary for two contiguous states to run a water boundary through an archipelago of islands off their coasts it is only possible to do so *by convention*, as international law provides no rule upon the subject. For that reason Great Britain and the United States, in the famous treaty of 1846, stipulated that the line between them should be continued westward along the forty-ninth parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of said channel and of Fuca's Straits to the Pacific Ocean." After prolonged and bitter controversy the Emperor of Germany was called upon, as arbitrator, to decide "whether the boundary line which, according to the Treaty of Washington of June 15, 1846, after being carried westward along the forty-ninth parallel of northern latitude to the middle of the channel which separates the continent from Vancouver's Island is thence to

be drawn southerly through the middle of the said named channel and of the Fuca Straits to the Pacific Ocean, should be drawn through the Rosario Channel as the Government of Her Britannic Majesty claims, or through the Haro Channel as the Government of the United States claims." In the exhaustive discussion embodied in the very able arguments presented by the opposing governments in that case *there was no pretense of the existence of any such general rule of international law or "custom" as complainant claims in this case.* Only the conventional rule laid down in the treaty was contended for by either side, and its construction was the only subject of the award. In the reply of the United States to the British case special emphasis was laid upon the "Worthlessness of the middle channel" as a boundary, because it was "so narrow that it cannot be seen until you are quite near." See Papers Relating to the Treaty of Washington, Vol. V. But the absence of such an international rule as to a *water* boundary is not of the slightest importance here, because it could not be applied even if it existed, for the simple and conclusive reason that Congress saw fit, in the act admitting Louisiana as a State, to establish for her a *land* boundary instead. From the junction of the Rigolets with Lake Borgne to the mouth of the Sabine river the boundary of Louisiana is the "*coast.*" The vital words of the act are: "including all islands within three leagues of the *coast.*" Congress thus established a definite land boundary for that State and not a shadowy and uncertain water boundary as claimed in the bill. A special rule having been thus established by competent authority, a general rule, even if such a one existed, could

not be invoked. General rules of international law are never applied under such circumstances.

See Grotius, *De Jure Belli ac Pacis* II, c. 3.
Bluntschli, XV, 2.
Martens, *Precis*, Sec. 119, p. 320.
Calvo, *Droit Int.*, 1, Sec. 19, p. 109.
Phillimore, Int. Law, 1, pp. 44–45 (2d ed., London).
Twiss, Law of Nations, 1, pp. 130–131.
Lawrence's Wheat., p. 28.
Halleck, Int. Law, 1 (Baker ed.), p. 50.
Lorimer, Ins. of Int. Law, 1, p. 43.

V.

Distinction Between the Coast Line of Physical Geography for the Purposes of Boundary and the Political Coast Line for the Purposes of Jurisdiction.

Physical geography simply reproduces the actual coast lines of maritime states, as they are defined by nature at the point of contact of the sea with the land. The following description of the coast of Maine, from an eminent geographical authority, may be taken as an apt illustration: "On the Atlantic coast, Maine presents an interrupted succession of peninsulas, islands and bays; and all these bays are the mouths of rivers—outlets of valleys having their origin far in the interior. Nothing similar is seen on all the territory of the Union. One must come to Norway or go to the extreme point of South America to find so long a part of the coast—400 *kilometers in a straight line* from the southwest to the northeast—so deeply cut up that we measure on it more than 4,000 *kilometers of contact with the sea.*" See Maine, in *Nouveau Dictionnaire de Géographie Universelle*, Saint Martin, Vol. III, p. 559. The actual coast

line of Maine, as known to physical geography, following, as it does, the sinuosities defined by the contact of the sea with the land, is about 4,000 kilometers, while the political coast line, superimposed upon it by operation of international law, is vastly shorter by reason of the fact that the artificial and imaginary line cuts across the heads of bays and inlets. The natural coast line, as known to physical geography, exists primarily for the purposes of boundary. The artificial coast line, as known to international law, exists only for the purposes of jurisdiction. That obvious distinction is well illustrated by Rivier in his *Principes du Droit des Gens*. Speaking of "*La mer littorale*," he says: "The name territorial sea is applied to all the seas or portions of the sea which belong to the territory: to the littoral sea, to the interior sea, in the various acceptations of the word, to gulfs and straits. It is the general and juridical term (*le terme général et juridique*), while the others are rather physical or geographical (*physiques ou géographiques*). The term, littoral sea, has the advantage of a special meaning. They say also jurisdictional sea, after one of the elements of the juridical situation of that part of the sea. The principle that the littoral sea forms a part of the territory is justified by the necessities of the preservation and security of the state, from the point of view, military, sanitary, fiscal, as well as the point of view of the interests of industry, specially of the right of fishing. The result is, for the coast and for *terra firma*, the littoral sea has the character of an accessory (*le caractère d'un accessoire*), and it cannot be taken independently of the coast (*indépendamment de la côte*)." Speaking

of "*Les Frontieres*," the same author says: "I have spoken already of the frontier on the sea, and of that on the land. There exists also special limits for the wants of administration, because the geographical and political frontier (*la frontière politique et géographique*) do not always answer in a sufficient manner." Vol. 1, pp. 145–146, 170. The distinction thus so clearly drawn between a geographical and political frontier is too obvious to require further illustration. If the geographical frontier happens to be on the sea or ocean, it is known as the *coast*, the point of contact between the sea-water and the land, upon which the political frontier is superimposed as an accessory that cannot be taken independently of the coast (*et qu'on ne saurait l'acquérir indépendamment de la côte*). That dependent and accessorial frontier created by international law, solely for the purposes of jurisdiction, is annexed *only to the outer coast* of a maritime state, which it shortens by cutting across the heads of bays and inlets, thus following what is called the general trend of the coast. The artificial and invisible coast line thus created by international law for the purposes of jurisdiction only, which, following the general trend of the coast, cuts across the heads of bays and inlets is not involved in this case in any form. We are only concerned with the inner coast line of physical geography, the point of contact between the sea-water and the mainland the line inside of the islands from which Congress has seen fit to measure zones of *three* leagues and *six* leagues. This obvious demonstration has been gone through with in order to add another reason to the argument made already against the fanciful theory of a deep water channel in the open

waters of the Gulf of Mexico, as a boundary between the States in question. If such a water boundary could be established at all, it would necessarily sweep around outside of the islands, beyond the political coast line (three miles seaward from low-water mark), that exists for the purposes of jurisdiction. Thus for the first time in the history of international law, we would have *the interior domestic boundary between two states fixed outside of the political coast line*, fencing off the federal commonwealth to which such states belong, from other nations. Such are the confusions and conflicts, which the application of false theories inevitably bring about.

If such a thing were legally possible, the great injustice that would be done Mississippi by declaring the "deep water channel," the real boundary and awarding to Louisiana dominion, sovereignty and jurisdiction over the waters and islands to the south of that line is demonstrated by the fact that this line hugs the Mississippi shore clear across Hancock County and across a large portion of Harrison County. Six miles eastward from the mouth of Pearl river, it is "within a few hundred yards" from the Mississippi shore. The following is copied from the testimony of Mr. George Dunbar, a very intelligent witness, largely interested in the territory in dispute, and put upon the stand by the complainant. On cross-examination (p. 317):—

> "Q. You said something about the proximity of that channel to the Mississippi shore between the mouth of Pearl River and Saint Joseph's lighthouse; does not that channel pass closely to the Mississippi shore?

"A. Yes, sir; right there.

"Q. Within a few hundred yards of it?

"A. Yes, sir; that is the nearest point that it touches.

"Q. How far is that point to the most eastern mouth of Pearl River?

"A. I should judge—I am not going to give you anything exact about that.

"Q. I don't ask you that; I ask for your best judgment.

"A. I should judge about six miles."

He goes on to give distances from points on the Mississippi shore southward to this line as follows: Point Clear is ½ of a mile (p. 430).

Gulf View about 4 miles (pp. 317–318), (nautical).

Waveland " 6 " " " "

Bay St. Louis " 5 " " " "

Pass Christian " 8 " (pp. 318–319) "

Mississippi City " 15 " " " "

Biloxi " 18 " (pp. 319 and 430) "

The deep water channel is less than 18 miles at every point from the Mississippi shore west of Biloxi lighthouse, or from the western end of Ship Island, which is forty miles east of the mouth of Pearl River.

Another more striking illustration of this injustice to Mississippi lies in the claim of sovereignty and jurisdiction three leagues from the northern and eastern outer shore of these islands. Three leagues north of Malheureux Point strikes the Mississippi shore, at or near the most eastern mouth of Pearl River. Three leagues from the north-eastern end of Isle à Pitre almost touches Ship Island, and reaches within a quarter of a mile of the artificial channel

dredged to the depth of 23 feet from Gulf Port to Ship Island, and leaves but a small margin of shallow water thence westward next to the Mississippi shore.

Three leagues from Grand Pass, and from Nine Mile Bayou, it actually reaches the Mississippi shore near Pass Christian. Either measurement leaves Mississippi practically no sea-front west of Ship Island.

See map No. 7, and sketch No. 2, Vol. 1, p. 1006.

It may be readily perceived what a disastrous effect it would have upon Mississippi should either of the above claims be fixed as the true boundary.

VI.

Meaning of "Coast" and "Shore" as Convertible Technical Terms.

With the fanciful theory of a deep water channel boundary eliminated from the case, it will be possible to consider without embarrassment the real issues involved in the construction of the acts in question. Both in their popular and technical senses "coast" and "shore" are identical and convertible terms. As defined in the Century Dictionary, "coast" is "2. The exterior line, limit, or border of a country; boundary; bound; * * * 3 (*a*) The side, edge, or margin of land next to the sea; the seashore * * * (*b*) The boundary line formed by the sea; the coast line." As defined by the same authority, "shore" is "1. The *coast* or land adjacent to a considerable body of water, as an ocean or sea, or a lake or river; the edge or margin of the land; * * * 2. In law, the space between ordinary highwater mark and low-water mark; foreshore." The fol-

lowing is contained in the Am. and Eng. Enc. of Law (2d ed.) Vol. IV, p. 818: "VII. WATERS AS BOUNDARIES. 1. Seashore, estuaries, tidal rivers—a. In general. High water-mark of the civil law was the water line as high up as the greatest winter flood tide rose. By the common law it is the line of ordinary high tide between the springs and neaps. Low water-mark—The shore. Low water-mark is the line of ordinary low tides. The space intervening between the high and low water-mark is the shore." By the same authority, "'coast' is defined to be the seaboard of a country." Vol. VI, p. 171. In *United States* v. *Pacheco*, 2 Wall., 587, this Court said: "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water-mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water-mark is always intended where the common law prevails. 3 Kent Com., 427. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican Government, the result will be equally against the position of the appellants." "*In a statute which requires* MEASUREMENT *from the coast*, the coast is the point of contact of the *mainland* with the sea; and when a bay intervenes the point of contact of the bay with the mainland is to be considered coast." Farnham on Waters and Water Rights, Vol. II, p. 1463, citing *Hamilton* v. *Manieff*, 11 Texas, 718. "What is shore.—The tract of land designated as shore,

which may be a parcel of a manor but is *prima facie* in the crown, is that strip lying along tide water over which the tide flows between the line of ordinary high tide and the line of lowest tide." Ibid., Vol. I, p. 227. It is thus beyond question that "coast" and "shore" are convertible technical terms; and that "In a statute which requires measurement from the coast, the coast is the point of contact of the *mainland* with the sea." That simple and obvious rule solves at once the first problem with which the Court is called upon to deal. The decisive word in the statute of April 6, 1812, defining the water boundary of Louisiana from the junction of the Rigolets with Lake Borgne to the mouth of the Sabine river is *coast*, "including all islands within three leagues of the *coast*." Here the statute requires a measurement from the coast, "the point of contact of the mainland with the sea," because Louisiana takes under the grant all islands within three leagues of the coast. How could this Court possibly find the power to wipe out that plain and specific special provision, and substitute in its place a general rule of international law, having no application to the subject-matter, which would prescribe a deep water channel in the open sea instead of the "coast" as a boundary? The decisive word in the statutes admitting Mississippi and Alabama is "*shore*." In the former the phrase is, "thence westwardly, including all islands within six leagues of the *shore* to the most southern junction of Pearl river with Lake Borgue"; in the latter, "thence eastwardly including all islands within six leagues of the *shore* to the Perdido river." It is confidently contended that when the three acts are construed *in pari materia*, as one connected

whole—*a method of construction which necessarily assumes contemporaneous enactment*—it must be held, in order to prevent "inequality and injustice," (1) that it was the intention of Congress to give to each state the islands directly in front of it on its southern seaboard, within the limits specified in each act; (2) that in marking out these limits the measurements shall be made from the "coast" or "shore," that is, from the point of contact of the mainland with the sea. If, in working out that result, a conflict should arise between that clause in the Mississippi Act which provides that that state shall have "all islands within six leagues of the *shore* to the most southern junction of Pearl river with Lake Borgne" and the claim of Louisiana to all islands within three leagues of her eastern *coast*, the claim of Mississippi should prevail under the rule laid down in *United States* v. *Kirby*, 7 Wall., 482, which declares that "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed *that the legislature intended exceptions to its language, which would avoid results of this character*. The reason of the law, in such cases, should prevail over its letter." As the cardinal purpose of the three acts taken as one connected scheme was manifestly to give to each State the islands directly in front of it to the south, there should be such a construction as will uphold that purpose. Only in that way can "injustice, oppression, or absurd consequence" be avoided. The Court has the right to presume "that the legislature intended exceptions to its language which would avoid results of this character." In

any event, the lion's share must remain to Louisiana, because she would still possess a total sea-front of at least five hundred miles as against seventy-one miles for Mississippi. The effort of Congress was to prevent as far as possible that inequality by giving to Mississippi "all islands within six leagues of the shore to the most southern junction of Pearl River with Lake Borgne." Certainly if there is a repugnance which construction must reconcile, it should be in favor of the effort made by Congress to compensate Mississippi, as far as possible, for the inequality which the nature of the case made inevitable. It will be hard indeed if Mississippi is to have one-half of her narrow southern sea-front cut off by islands belonging to a neighbor far more fortunate, in that respect, than herself.

VII.

What is an Island? Geographical form and not geological origin the criterion.

The construction just contended for will not touch in any way the mainland of Louisiana. It may take away some of the islands within three leagues of her eastern and northeastern coast because of the dominant intention of Congress that each State should possess all islands on its southern sea-front within the limits defined. Certainly it is far more just and equal for construction to harmonize repugnancy by preserving *the cardinal purpose* of the statutes through a sacrifice of *the incidental* than the contrary. In any event, it is all important for the Court to determine where the mainland of Louisiana ends and where the islands on her eastern coast begin, a subject upon which complainant

has been ominously silent. From its judicial knowledge of matters of art and science the Court knows that geographers divide islands into two classes: *first*, Oceanic islands, situated far from any continent; *second*, continental islands, which do not as a rule lie far from continental shores, "from which they are usually separated by shallow seas. * * * Continental islands, as a rule, show community of flora and fauna with the neighboring land." The International Geography, p. 62. It is a fundamental principle with geographers, in the classification of land forms, to determine the character of an island solely by reference to its form, regardless of its geological origin. "From the geographical point of view land forms are best considered, in their larger aspects at least, from the point of view of form alone, *without reference to their geological history.*" Ibid., p. 48. This authority has been cited in view of the attempt made by complainant to maintain, as if it were a matter of importance, that because there is an identity between the soils of some of the islands in question and the mainland, it must be assumed that, at some remote period in the past, they were united. Even a piece of the soil from the Isle à Pitre has been presented here as an exhibit in support of that contention. (See record, p. 346). That the fact thus set up has not the slightest practical or legal value, if true, has been demonstrated by one of complainant's leading witnesses, Dr. Wm. C. Stubbs, who says: "I am engaged in work for the State of Louisiana, first as professor in the State University, second, as director of the Experimental Station, and third, as director of the Geological Survey." This expert, who was offered by complainant as such, when

asked whether the geographical character of an island is affected at all by its geological origin said:

"Q. And we come out in a bay to one of those islands and find it at eight or ten miles from the mainland, and you, as a geologist, take some of the soil and then go to the mainland and take some of the soil and find the soils identical—would that be any the less an island, if it was ten miles away from the mainland entirely surrounded by water, because it was formed in that geological process?

"A. No, sir.

"Q. It would not affect its geographical character?

"A. No, sir; an island is a body of land entirely surrounded by water, *it is immaterial how it is made.*

"Q. The fact of its geological formation has got nothing to do with its geographical character?

"A. No, sir. * * *

"Q. So, is it not true when it comes to determining from the standpoint of a geographer that an island is a body of land surrounded by water, the fact of its geological origin has got nothing to do with its geographical character?

"A. Yes, sir; that is true.

"Q. Now, as I understand you, your opinion is, that this sample No. 1, which the testimony tends to show came from the Isle à Pitre, you say looking at that as a geologist examining the qualities of it, your conclusion is that that is part of the general deposit that has been made by the Mississippi River out in that direction during the same period or epoch, as to which geologists will state no time?

"A. We won't state any length of time. But the geological time in which that was deposited is to-day, it is the present age.

"Q. But that present age, as I understand, may embrace a period of five millior. years?

"A. We don't know.

"Q. It may be five million years?
"A. Yes, sir." Record, Vol. 1, pp. 332, 346.

VIII.

No Basis Whatever for the Contention That the Islands in Question Were Ever a Part of the Mainland of Louisiana.

The net result of the testimony on this point given by the geological expert offered by complainant is this: During an indefinite period of time, possibly five millions of years, an alluvial deposit has been made by the Mississippi river in a shallow sea, out of which these islands have arisen, and such geological origin has nothing whatever to do with their geographical character as islands within historic times. And here the fact should be emphasized that this expert never attempted to say, that, at any time, such islands were ever a part of the mainland. Upon the contrary he says: "These [islands] on the *coast of Louisiana have not been cut off; they have been formed by the waves and winds of the Gulf.*" Record, Vol. 1, p. 345. Nothing could more completely overturn the theory that such islands—formed by the winds and waves of the Gulf out of the shifting alluvial deposits of a great river in a shallow sea—were once a part of the main land. It is hard to over-estimate the importance of this statement in view of the method employed by complainant's counsel to explain the geological process through which the archipelago of islands on the east coast of that State was formed. Dr. Stubbs has taken great pains to state that the alluvium from the Mississippi River "is easily transported by water, by virtue of the fact that its physical size is very minute, consisting mainly of clay and silt, it is easily transported

by water; in other words, it is very nearly of the same specific gravity as water, and hence it is very difficult to settle it." Record, p. 354. When this sediment carried in solution in the fresh water reaches salt water it is precipitated. "It (the salt water) has a chemical effect in precipitating it." B. M. Harrod, p. 126. Dr. Stubbs says: "For instance, the peninsula of Florida has been built up by the Gulf Stream, carrying the sediment from the Mississippi as it turns the coast of Florida and goes up and touches it and Cuba; it is deposited there and it is building up Cuba, so that geologically speaking some of these days Florida and Cuba will be united, but that is a very slow growth." p. 338. In view of that statement the attention of the witness was called to the geological process through which archipelagoes of islands along the coasts of certain countries have been formed by being cut off from the mainland, notably the archipelago near the coast of Alaska which was so cut off from the mainland by submergence. See International Geography, p. 667.

After admitting in general terms that the Alaskan archipelago was formed in that way, Dr. Stubbs emphatically denied, while being interrogated as to "this archipelago of islands lying off the east coast of Saint Bernard Parish, and the south coast of Mississippi," that any such process had been at work on the coast of Louisiana.

> "Q. Is it not a very familiar matter in the study of geology, the causes by which these archipelagoes are formed; the process by which such islands have been cut off from the mainland?
>
> "A. Sometimes, and at others not. *These on the coast of Louisiana have not been cut off; they*

have been formed by the waves and winds of the Gulf." Record, pp. 344-345.

Any other conclusion would be in positive conflict with his theory of the process through which the sediment or alluvium of the Mississippi is moved by the currents and deposited in the Gulf in land formations. At p. 334, he says:

"A. Your question means this, that prior to the levee system what influence did these bayous have on the surrounding country as they went to the sea?

"Q. Yes.

"A. They had, in a small way, the same effect that the Mississippi river had upon its surrounding country in overflows, they deposited a great deal of sediment that was being carried to the sea, and help to build up that section of the country. All the marshlands that we now have along the banks of bayou Terre aux Bœuf that are being cultivated came from the deposit of this stream or bayou that ran through that country, and in fact the whole of Saint Bernard Parish has been built up by that agency, the bayous coming from the Mississippi river."

Vitally important testimony of Major B. M. Harrod:

There is nothing whatever, either from the geological or historical point of view, to give color to the theory that the islands in question were ever a part of the mainland of Louisiana, *as one solid mass*, which has been broken up into islands since 1810, by subsidence, or by the action of storms and tides. Major B. M. Harrod, the eminent civil engineer offered by complainant, has made a lucid statement on that subject that should be conclusive:

"Q. The counsel for Louisiana have spoken of

the Saint Bernard archipelago. Is there an archipelago in that neighborhood, in the neighborhood of Saint Bernard Parish?

"A. Well, I have not heard the expression before. There is an area of land which is pretty well cut up by bodies of water, lakes, and bayous, which I have attributed to tidal movements and subsidence.

"Q. Well, do you believe that since the years 1812, or 1817, the conformations of those islands have been materially changed either by an action of tidal waters or subsidences, or by any other agencies? And we mean by those islands in this question those nearest and adjoining Saint Bernard—the mainland of Saint Bernard Parish.

"A. I could not give any answer about the time, since 1817, or 1819. I believe that peninsula was formed by the river deposits being placed out in a shallow sea, that had tidal movements and *instead of forming a solid peninsula* it left these open areas through it for the tidal movement *in and out of Lake Borgne and Lake Pontchartrain, and that those lakes or spaces of water have been enlarged since their formation, by subsidence. That is my opinion about the formation of that peninsula; that water areas were left there* WHEN IT WAS ORIGINALLY FORMED *and have been subsequently enlarged by subsidence.*

"Q. How long do you think this process has been going on; how many years?

"A. *For centuries I have no doubt.*" Record, p. 135.

Major Harrod thus settles against complainant the most vital fact in the case, which is that the islands in question were formed in a shallow sea by the deposit therein of the river alluvium which never constituted a solid mass as a part of the mainland. His words are: "the river deposits being placed out in a shallow sea that had tidal move-

ments AND INSTEAD OF FORMING A SOLID PENINSULA *it left these open areas through it for the tidal movement* in and out of Lake Borgne and Lake Pontchartrain and that *those lakes or spaces of water* have been enlarged since their formation, by subsidence." The fact that Major Harrod improperly calls the archipelago of islands thus formed a "peninsula" is of no importance whatever, as he admits that "a solid peninsula" was never formed. Upon the contrary a group of islands was formed surrounded by water subject to "the tidal movement in and out of Lake Borgne and Lake Pontchartrain, and that those lakes or spaces of water have been enlarged since their formation by subsidence." He insists "that water areas were left there when it was *originally formed* and have been subsequently enlarged by subsidence." Thus complainant's two experts, Dr. Stubbs and Major Harrod, agree in the self-evident conclusion that, even from the standpoint of geology, the islands in question *were islands from the very beginning*, and were never a part of the mainland of Louisiana. With that decisive fact clearly established a mass of irrelevant testimony, as to subsidence, and storm action subsequent to 1812, passes out of the case. And so nothing is left to complainant, in this regard, except the claim that these coast islands are composed of the same soil as the mainland, a matter which has no legal significance whatever. An island is no less an island because it is so composed. Due importance should also be attached to Major Harrod's statement that the geological process through which these islands were formed has been going on "*for centuries*." He declined to give color to the idea that any material change had taken

place in their conformation since 1817, or 1818. The testimony of Mr. Baylor of the Coast and Geodetic Survey, had already put that contention beyond question.

No stronger confirmation can be given of the fact that the islands in question constitute an archipelago, and that they are not a part of a peninsula, than the following statement by the United States Fish Commission, in a report of the cruise of the "Fish Hawk" made in February 1898, in response to a request, by resolution, of the legislature of Louisiana, for an investigation of the oyster industry in the region in question. That part of the report devoted to a "general description of the region," contains the following: "*The land constitutes* A LOW-LYING ARCHIPELAGO OF IRREGULAR ISLANDS, *separated from one another by shallow bays, muddy lagoons, and tortuous bayous, the area of the water being somewhat greater than that of the land.* The bayous are of two classes, rather broad, short, deep passes, like Nine-Mile bayou, Three-Mile bayou, and Deep Pass, which serve as the main avenues of tidal flow to and from the interior bays [as stated by Major Harrod], and long narrow water-courses, which characteristically run lengthwise of the islands, as is seen in the case of Door Point bayou, Dead Man bayou. The bayous of the first class generally have a depth of from 18 to 42 feet, those of the second class from 5 to 12 feet, and all are more or less obstructed by bars across their mouths." Record, p. 2037

IX.

o Material Changes in the Conformation of the Islands since 1812.

The testimony makes it perfectly clear that there has n no material changes in the general conformation or ation of the islands in question since the year 1812. ch minor changes as have taken place have simply lened or narrowed a bayou here and there, or reduced the re line of an island not exceeding anywhere 300 or 400 . Dr. Stubbs has put forward a theory of the general sidence of this entire territory at the rate of about four to the century. That theory is expounded by him as ows:

"Q. The subsidence of the surface that we have been talking about is going on with the bottom of the Mississippi Sound at the same rate is it not?

"A. Yes, sir.

"Q. Being above the water makes no difference?

"A. No, sir.

"Q. The subsidence of the land under the water is at the same rate as the subsidence of the land above the water?

"A. Yes, sir." Record 354.

The practical result of this theory is that the subsidence, if it takes place, works no material change in the eral physical aspects of the region. That is fully adced by Dr. Stubbs in the following questions and ans:

"Q. Look at this map and examine it and see the general geographical formation along this coast

from Nine Mile bayou eastward to the Isle à Pitre, and then southward through Nine Mile bayou to Lake of the Mound; have you reason to believe that since 1812 there has been any material change in the general physical and geographical aspects of that region?

"A. I would say so, yes; for this reason, I would say that this has undergone the same subsidence as the remaining part of the Mississippi coast, and that many points that were formerly islands are now submerged.

"Q. Have you any reason to believe that any general change in the physical and geographical aspect of the area to which I have referred has taken place except such as would result from that subsidence?

"A. I do not know of any other.

"Q. Except the inference that you draw from the general operation of that subsidence? then—

"A. That is all.

"Q. You know of no reason to suppose there has been any general change of appearance in the physical aspect of the region I have indicated from 1812 down to this date?

"A. *That is right.*" Record, p. 349.

J. B. Baylor, another witness, offered by complainant, who for many years has been connected with the Coast and Geodetic Survey, and who in 1893 made a survey of this particular part of the coast, taking the data for his answer from a prior one made in the 50's, says:

"Q. Did you take any steps by trigonometrical methods to locate any of these points which had been established by the prior survey made in this locality?

"A. Yes, sir; I took angles and examined that marsh to try and find them.

"Q. Do you know or have you any data to show how far back from the coast line these stones were placed at the time they were originally located by the surveyors that were then doing this work?

"A. You mean the coast line between Malheureux Point and Isle à Pitre?

"Q. Yes, sir.

"A. Yes, sir; their stations were fully examined, giving their distance from the shore line, I had that description with me.

"Q. Did you determine by any trigonometrical method where this point should be in any one instance?

"A. I determined within a few yards or feet, something like that.

"Q. How did that point compare as to its distance from the shore line, with the records which you had showing the original distance from that point to the shore line?

"A. Well, as a rule there has been no very marked change in the last fifty years.

"Q. Has there been any change?

"A. Yes, sir; there have been changes; in some places the shore has washed away, but to no great extent.

"Q. What would you call a great change?

"A. I believe a great change would be say 300 or 400 feet.

"Q. What is the maximum change that you noticed in these points established by you?

"A. Well, I did not go into that question very closely; but I should not think, I could safely say, I did not find any change of over 300 feet in 50 years.

"Q. Would that apply to the coast line generally, from Malheureux Point to Isle à Pitre?

"A. Yes, sir, generally; there may be instances where it washed away more than that; but, as a general proposition, my work showed conclu-

> sively to my mind, that there has been no marked change in regard to the washing away of that coast in 50 years. We have accurate work on trigonometrical methods running back to about 1848; most of those points were established in 1855 that I examined there." Record, pp. 415-416.

Thus the complainant has established by a competent expert that it is certain from the scientific data in possession of the Coast Survey and from a recent survey made by him, "*that there has been no marked change in regard to the washing away of that coast in 50 years.*" The data to which he refers reaches back to 1848, a point of time only thirty-six years subsequent to the admission of Louisiana as a State. Can it be presumed that any marked change took place by the washing away of the coast during that thirty-six years in view of the scientific demonstration that no marked change from that cause has taken place since then? This aspect of complainant's case has perished at the hands of her own witnesses. A specially hard blow at the subsidence theory has been delivered by complainant's witness, Charles Marshall, Superintendent of the New Orleans and Mobile division of the Louisville and Nashville railroad, who says: "Q. And I understand you to state, in your direct examination, that you are of the belief that these marshlands over which your road runs are increasing in height rather than subsiding. A. Yes, sir; I stated that I did not know anything about the general or geological theory of subsidence; that my personal belief was that by accretion the ground was getting firmer. Q. And that belief is based on your observation during the last 20 years of that section? A. Yes, sir; 18 years. Q. And that

applies to the marshland east and west of Pearl River? A. West of Pearl River. Q. You think those marshes are firmer than they were in 1886? A. I think so." Record, p. 691.

X.

What Must be the Character of the Land Composing an Island?

"An island is a body of land surrounded by water." Enc. of Law, Vol. XVII, p. 530. The elements involved are: (1) the land composing the island, which must be of a certain character; (2) the water severing it from the mainland, which must be of a certain character. A body of land continually covered by water is not an island. It was held in *Weber* v. *The Pere Marquette Boom Co.*, 62 Mich., p. 626, that a submerged fen is not an island. The court, in that case, said: "No land has ever been seen above the water within the territory described in the plaintiff's declaration in this case." An island does not, however, lose its character as such although "at high tide it is almost covered by water." Such was the vital question in *De Guyer* v. *Banning*, 167 U. S., 723, in which an action of ejectment, according to the statement made by this court, was brought "to recover the possession of a certain island, known as Mormon Island, in the inner bay of San Pedro, California. At mean high tide the island has an area of less than 1 acre; at mean low tide, about 18.88 acres. The area of the bay, including the island, is 1,100.59 acres." Banning, the defendant and purchaser of the island, testified: "This tract of land known as Mormon Island is an island; at about half tide, it is an island, and is now an

island at low water; at low water it is only partially surrounded by water; at low water it would not be surrounded by water; at mean tide there would be about 2 feet of water around it; at high tide it is almost all covered with water. * * * A very small portion of the island is above ordinary high water. At mean tide, I don't think there is an acre above water." Upon that state of facts it was held that "an island within the exterior limits of a bay and almost covered at high tide is not included in a patent for a private land claim." As the title to Mormon Island was the subject of the suit, no conclusion could be rendered without a determination, upon the proof before the court, as to its character as such. It was held to be no less an island, because at high tide it was almost covered by water. That an island does not lose its character as such by erosion or submergence was settled in *Widdicome* v. *Rosemiller* (Circuit Court W. D. Missouri, C. D., October 21, 1902), 118 Fed. Rep. 295: "Island No. 24 in the Missouri River, within the present State of Missouri, was surveyed by the United States in 1820, and then contained about 50 acres. Subsequently during floods, it was submerged, and a portion of the surface was washed away; but on the subsidence of the waters a portion of it re-appeared and at no time was it washed away to the level of the bed of the river; a channel remained between the island and the west bank of the river. * * * Held, that the title of the United States to the island was not lost by the erosion or submergence, and that, by its conveyance after it re-appeared on the reliction of the waters, plaintiff took title thereto with the additions made by alluvion and accretion." The facts

in this record, drawn largely from complainant's witnesses, show beyond all question that the archipelago fringing the east coast of Louisiana is composed of islands which are such in the full geographical and legal sense of that term. As complainant contends the soil of these islands is identical with that of the mainland, and under all normal conditions they are above water. Each of the larger ones has an individual character and a name of its own. To all inhabitants of that vicinity, no matter whether they dwell in one State or the other, Isle à Pitre, Petit Pass, Racoon Island, Little Racoon Island, Crooked Island, Mud Cross Island, Pirate Point Island, Nigger Island, Dead Man's Island, Shell Island, Brush Island, Mink Island, Wild Goose Island, Elephant Point Island, Sundown Islands, Door Point Island, and others, are as well known as Cat Island, or Half Moon Island. By these names they have been known as islands from time immemorial. That they are distinct bodies of land surrounded by navigable tide water is as indisputable as any other fact in the physical environment of that region. As illustrations of that statement the following particulars will be given of the nature of the soil of these islands and of their capacity to be made the seats of human habitations. Alfred Joseph Monier, a witness for complainant, testifies that in January, 1904, he walked from Malheureux Point to Isle à Pitre in company with George Thiel, who rowed a boat along the water's edge to carry him across Nine Mile Bayou and other waters, dividing the islands from each other.

"Q. Did you have any difficulty in walking along this shore line?

"A. None at all.

"Q. What was the character of the shore line as you went along?

"A. The shore line was hard.

"Q. Was it above water?

"A. Yes, sir.

"Q. What did you do when you came to Blind Pass?

"A. Well, the one that was with me pulling the skiff crossed me over.

"Q. Did you get out of the skiff again when you got to the other side of Blind Pass?

"A. Yes, sir.

"Q. Did you have any trouble in walking along the shore line?

"A. No, sir; no trouble at all.

"Q. About how much above the water was the shore line?

"A. About a foot and a half to two feet. * * *

"Q. Could you have driven a buggy on any part of that shore line?

"A. Yes, sir. * * *

"Q. Could you have driven it the whole way, a horse and buggy?

"A. Not the whole way, because they had those bayous to cross. * * *

"Q. Did you get your feet wet walking along there?

"A. No, sir.

"Q. You went dry shod?

"A. Yes, sir. * * *

"Q. Do you undertake to tell the Commissioner that that sort of a trip could be made at any time during the year?

"A. Yes, sir.

"Q. And that there is no difficulty about it all?

"A. No, sir; there is not.

"Q. There is no tall grass or anything to interfere with you?

"A. Very few places they have tall grass.

"Q. Do you mean to say that is the character of the islands across to the south of you? Could you have made that trip anywhere across those islands from Malheureux Point to the east end of Isle à Pitre the same as you made it along the water's edge?

"A. Yes, sir.

"Q. What houses did you find along that route, habitations that people lived in?

"A. Well, I did not find but one house that people live in.

"Q. Where was that?

"A. Couldn't tell you the name of the bayou.

"Q. It was by Three Mile bayou was it not? Is it not true that that is the only house you say on that trip?

"A. At Three Mile bayou there is one house, but nobody lives in it." Record, pp. 325–327.

George Thiel, another witness for complainant, who was the companion on this trip of Monier, testifies:

"Q. What purpose did you go there for?

"A. I was sent over there for the purpose of pulling a boat along the lake and Monier was to walk the marsh, and I pulled the boat along and while I went along I would get off from time to time and go ashore and walk the marsh a piece to find out whether it was solid and it was solid, the best marsh I ever went in, *you can carry cattle there and turn them loose and they would be very well off*, that is one of the best marshes I ever traveled on and I have been on many marshes, but that is the best I ever traveled on.

"Q. Did you follow along with the skiff all the way from Malheureux Point to Isle à Pitre?

"A. Yes, sir.

"Q. Did you see Alfred Joseph Monier walking along there?

"A. Yes, sir; I saw him walk every step of it.

"Q. Did you see him walk that whole distance?

"A. Yes, sir.

"Q. What did you do when he came to a bayou or anything like that?

"A. Then I pulled him to the shore, I carried him across the bayou, then he would get out on the other side and walk again, and I would row into the lake and go to pulling again. * * *

"Q. You have had some experience in trembling prairies?

"A. Yes, sir.

"Q. Was that a trembling prairie?

"A. No, sir; it was perfectly solid, there was no trembling prairie about that. * * * A. I didn't find anything of the kind there, but I suppose if they would go there and plant it it would grow such as cotton that can stand salt water, rice, cane." Record, pp. 330–331.

The Court should bear in mind that these two witnesses were specially delegated by complainant to make a careful examination of the lands on these islands with a view to testifying in this case. Monier says:

"Q. That trip was made to prepare you to testify in this case, was it not?

"A. Yes, sir.

"Q. And so it was with your companion?

"A. Yes, sir.

"Q. The time was selected by others for your start?

"A. Yes, sir.

"Q. And you were paid for the trip?

"A. Yes, sir." Record, pp. 329–330.

Under these conditions complainant is estopped to deny the physical character of the soil on these islands as

described by her own witnesses. The mistaken theory upon which complainant acted in offering this proof was that the geographical character of an island can be affected by its geological origin, and no doubt by the idea that these islands were once a solid body of mainland since broken up. Both assumptions have been proven to be entirely untenable, the last by complainant's expert, Dr. Stubbs, who, speaking as a geologist, said that these islands were not cut off from the mainland.

> "Q. Is it not a very familiar matter in the study of geology, the causes by which these archipelagoes are formed; the process by which such islands have been cut off from the mainland?
>
> "A. Sometimes, and at others not. *These on the coast of Louisiana have not been cut off; they have been formed by the waves and winds of the Gulf.*" Record, p. 345.

Complainant's witness, Louis Cucullu, president of the Peoples' Bank, of New Orleans, who says he knows well the territory in question, testifies as follows: "A. Like I tell you, on the shore, all along the shore of Lake Borgne and the Gulf, *those marshes are always above water*, and it takes a high tide to cover most of those marshes."

XI.

What Must be the Character of the Water Surrounding an Island—Test of Navigability.

It is necessary that a strip, not necessarily a wide strip, of navigable water should separate an island from the mainland. In *Dumphry* v. *Williams*, 2 Pugsley (N. B.), 350, it was said: "so far as appeared, the island in dispute existed as a separate and distinct island, long before Currie

got possession of the Flat Island; and at that time, and until recently, there was a channel between the two islands about one or two rods in width, navigable for canoes, at low water in summer." In *King* v. *Young*, 76 Me., it was held that a mussel-bed was not an island because no navigable water flowed between it and the shore at low tide. An island must be surrounded not only by water but by navigable water. "A stream which has sufficient depth and width to float vessels, boats, or other water craft used in the transportation of freight or passengers, or both including rafts of lumber is navigable." *American River Water Co.* v. *Amsden*, 6 Cal., 443. "Tide water navigated for pleasure is navigable water, although the craft on it have never been used for the purposes of trade or agriculture." *Atty. Gen.* v. *Woods*, 108 Mass., 436. See also *Grand Rapids* v. *Powers*, 89 Mich., 94; *Bamprey* v. *State*, 52 Minn., 181. "All tide water is *prima facie* public and navigable, *the burden of proof is on the person alleging the contrary.*" Farnham on Waters, Vol. 1, p. 125, citing *Sullivan* v. *Spotswood*, 82 Ala., 163. See also *Dumas* v *Garnett*, 32 Flor., p. 73. There is nothing in the evidence to give color to the idea that the islands in question are submerged islands. Upon the contrary it clearly appears from the proof offered by complainant, that they are composed of firm soil elevated generally from a foot and a half to two feet, and some at 3 to 4 above the tide, upon which a man can walk dry shod even in the most rainy month of the year; that even a buggy can be driven conveniently along their shores; that there are some houses upon them; that certain plants, such as rice, cotton, and

cane could be grown upon them; that they are swept by water only in storms or during extraordinary tides. Such being the uncontradicted testimony of complainant's own witnesses, specially prepared to testify on that subject, it only remains to be proven that such islands are surrounded by *navigable* water. Complainant's witnesses have with equal emphasis, settled that fact. Mr. Baylor of the Geological Survey, who has critically examined the entire area, says:

> "Q. What is the usual definition given by geographers to an island. What is an island from the standpoint of physical geography?
>
> "A. An island is a body of land surrounded by water.
>
> "Q. Well, now, let us begin from Nine Mile Bayou and take the piece of land that is bounded on the west by Nine Mile Bayou and on the east by Three Mile Bayou and on the north by Mississippi Sound and on the south by Nine Mile Bay. Under the ordinary definition of physical geography, isn't that an island, a piece of land surrounded by water?
>
> "A. Yes, sir; that is an island.
>
> "Q. Isn't it a piece of land surrounded by water? Can't a craft sail all around that piece of land—a craft of moderate draft?
>
> "A. Well, a craft can sail all around a good deal of that portion of Louisiana.
>
> "Q. I ask you this particular question: can a craft sail all around this piece of land, a craft of moderate draft, this piece of land I have named?
>
> "A. Yes, sir; moderate draft.
>
> "Q. Let us go to the next piece of land, bounded on the west by Three Mile Bayou and on the east by Johnson Bay and the neck of water connecting it with Mississippi Sound, on the north by Mississippi Sound, and on the south by the

body of water around Nigger Point; is that a body of land surrounded by water around which a craft of moderate draft can sail?

"A. Yes, sir.

"Q. Now, let us take the next piece bounded on the east by Turkey Bayou, bounded on the north by Mississippi Sound, bounded on the west by Johnson Bay and the bayou connecting Johnson Bay with Mississippi Sound; isn't that a body of land surrounded by water around which a craft of moderate draft can sail?

"A. Yes, sir.

"Q. Now, let us take the next piece bounded on the west by Turkey Bayou, on the north by Mississippi Sound, on the east by Grand Pass and the bayou connecting Grand Pass with Karako Bay; isn't that a body of land surrounded by water around which a craft of moderate draft can sail?

"A. I want to look at this chart here. Yes, that is true; a craft of moderate draft can sail around that body of land.

"Q. Let us take the next one, Isle à Pitre, isn't that a body of land surrounded by water around which a craft of moderate draft can sail?

"A. Yes, sir.

"Q. So, then, is it not true that what you have spoken of as the coast line between Nine Mile Bayou on the west and Isle à Pitre on the east, is it not composed of a string of islands such as you have described, bodies of land surrounded by water around which a craft of moderate draft can sail?

"A. You expect me to give you my honest frank opinion?

"Q. Yes.

"A. *I think it is*, but no more than a great deal of the Mississippi delta.

"Q. That you see is purely argument. That may be so; they can argue you that. But I am just trying to get at the facts.

"A. *They are certainly bodies of land around which vessels of moderate draft can sail.*" Record, pp. 421, 422.

Capt. Alfred C. Ruiz, deputy inspector of the La. Oyster Com., in charge of its patrol boat "Majestic," of a draft of 3½ feet with ballast, admitted that he can navigate the waters around these islands with only a little difficulty in that boat.

"Q. What is the average depth of the water inside of the Louisiana marshes?

"A. Taking the average it would be about 2½ to 3 feet. * * *

"Q. How much water does the "Majestic" draw?

"A. Three feet and a half, with ballast

"Q. She has been going through these marshes as you have testified?

"A. With high tide. I have to take my chances to go, and then I am dragging, I can't use my centerboard."

But the fact remains that a boat of that draft can go. In some places of course the channels are very deep. The same witness says:

"Q. Has that Nine Mile bayou a deep channel?

"A. Very deep." Record, pp. 307–308.

Complainant's witness Charles Sanger, who has navigated among these islands, in the interior waters, as far as Lake of the Mound, says:

"Q. Ever sailed through these interior waters?

"A. Once.

"Q. Once?

"A. At Treasure Bay I know we went through there in ordinary tide.

"Q. Show me your course, how you travelled, where you went into it and where you went out

that one time? Where did you go in, through what?

"A. We went in through Nine Mile bayou, then we went through.

"Q. Bay Bordeaux, then into Treasure Bay, then where did you go?

"A. I think somewhere up in here, that is where we stopped. (Witness here pointed out on the map before him the Lake of the Mound.) By Mr. Zacharie:

"Q. Do you mean to say you went into the Lake of the Mound?

"A. Somewhere up in here.

"Q. Somewhere near Lake of the Mound?

"A. Yes, sir.

"Q. Did you go out there with your boat?

"A. Yes, sir.

"Q. Did you come out the same route?

"A. Yes, sir."

The navigable character of the water as far as Lake of the Mound was thus clearly established. Record, pp. 264–65.

Capt. A. S. Cowaon, who has been familiar with the region in question, "for half a century," says:

"Q. Is it not true that any time during your knowldege of that coast that water craft of light draft could pass southward through any of these water courses?

"A. Yes, sir; they could always go southward through them.

"Q. How far south?

"A. Vessels drawing three feet of water came down as far as Morgan Harbor, that is about 24 miles down in the marsh, that is about southwest from the entrance of Three Mile Bayou, it don't show on this map at all, it is way south of Drum

Bay; mind you; I am speaking of common tide. In a northwester they couldn't go through at all."

John Walker, a steamboat-man since 1855, says: "Q. What craft did you have in going through Three Mile Bayou? A. I had a small steamboat. (1867). Q. How much did she draw? A. Well, she only drew about four feet, *but I found seven feet of water there.* Q. You found seven feet of water where? A. In the entrance. Q. You say that you went through Three Mile Bayou? A. Three Mile Bayou. Q. Where did you go, Captain? A. From Chandeleur into Lake Borgne. Q. From Chandeleur Sound through Three Mile Bayou into Lake Borgne? A. Yes, sir. Q. With a steamer drawing four feet? A. Yes, sir; she was a steamer." Record, p. 1271. And here reference must again be made to the report of the United States Fish Commission, as to the result of the cruise of the "Fish Hawk." In describing the navigable character of the water by which the "low-lying archipelago of islands" is surrounded, that report states: "The bays, with the exception of several of those opening into Chandeleur Sound, communicate with the outer water by narrow mouths. Their floors are comparatively level and, with one or two exceptions, are composed principally of soft mud, with scattered patches of hard mud and sand, usually so small in area as to be negligible in plotting and soundings. *The depth of water is generally from 3 to 6 feet although in some of the bays, particularly those to the eastward, there are channels through which a considerably greater depth can be carried.*" Record, p. 2037.

XII.

Worthlessness of Maps in Boundary Controversies.

The business of a cartographer, or map-maker, is to describe land forms, not to settle titles of particular sovereignties to particular parts of the earth's surface. The value of every map depends upon two factors: first, the completeness of the data out of which it is constructed; second, the skill of the cartographer in working such data into an harmonious whole. Early maps, which are necessarily based upon incomplete data, are almost invariably misleading guides. For that reason, international jurists generally regard such maps as of little or no value in boundary controversies. The great English jurist, Sir Travers Twiss, in speaking of the uselessness of maps in the investigation of boundary questions, has even regretted that they are ever appealed to at all. He says: "Maps, however, are but pictorial representations of supposed territorial limits, the evidence of which must be sought for elsewhere. There may be cases, it is true, where maps may be evidence; when, for instance, it has been specially provided that a particular map, such as 'Melish's Map of North America,' shall be the basis of a convention; but it is to be regretted that maps of unsurveyed districts should ever have been introduced into diplomatic discussions, where limits conformable to convenient physical outlines, such as headlands or water-courses, are really sought for, and are understood to be the subject of negotiation. The pictorial features of the country which, in such cases, have been frequently assumed as the basis of negotiation, have not unusually

caused greater embarrassment to both parties in the subsequent attempt to reconcile them with the natural features, than the original question in dispute, to which they were supposed to have furnished a solution." The Oregon Question, p. 228. As an illustration of "the general futility of the argument from maps in the case of disputed territory," the author refers to a letter written during the Oregon dispute, by Mr. Buchanan, while President of the United States, to Mr. Pakenham, the then British Minister at Washington, in which the former says: "Even British geographers have not doubted our title to the territory in dispute. There is a large and splendid globe now in the Department of State, recently received from London, and published by Maltby and Co., manufacturers and publishers to 'The Society for the Diffusion of Useful Knowledge,' which assigns this territory to the United States." Sir Travers adds: "The history, however, of this globe is rather curious. It was ordered of Mr. Malby (not Maltby), for the Department of State, at Washington, before Mr. Everett quitted his post of Minister of the United States in this country. It no doubt deserves the commendation bestowed upon it by Mr. Buchanan, for Mr. Malby manufactures excellent globes, but the globe sent to Washington was not made from the plates used on the globes published under the sanction of 'The Society for the Diffusion of Useful Knowledge,' though this is not said by way of disparagement to it. The Society, in its maps, has carried the boundary line west of the Rocky Mountains, along the 49th parallel to the Columbia River, and thence along that river to the sea; but in its globes the line is not

marked beyond the Rocky Mountains. *Mr. Malby, knowing that the globe ordered of him was intended for the Department of State, at Washington, was led to suppose that it would be more satisfactorily completed, as it was an American order, if he coloured in, for it is not engraved, the boundary line proposed by the Commissioners of the United States. The author would apologize for discussing so trifling a circumstance had not the authorities of the United States considered the fact of sufficient importance to ground a serious argument upon it.*" Preface, pp. VII, VIII. In "Greenhow's History of Oregon and California," note "F" at p. 437, this pungent statement occurs: "These discrepancies should not excite surprise, for maps and books of geography, which are most frequently consulted in relation to boundaries, are or rather have been, the very worst authorities on such subjects; *as they are ordinarily made by persons wholly unacquainted with political affairs.*" In *United States* v. *Texas*, 162 U. S., 1, this Court has recognized the general rule of international law as stated by Sir Travers Twiss, that when a particular map is referred to in a treaty or compact, it is to be given the same effect as if it had been expressly made a part of such treaty or compact. In that case it was said: "If, as asserted by the State, this case should be determined upon the basis that the 100th meridian is where the Melish map located it, and not where it is in fact, this Court may well decline to recognize a claim attended with such grave consequences as those suggested by the answer, unless it be clearly established. * * * But are we justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely

correct, in all respects, and not to be departed from in any particular or under any circumstances? * * * We have said that the treaty itself, upon a reasonable interpretation of its provisions, left it open to the contracting parties, through commissioners and surveyors, to fix the lines with precision, and, therefore, to show, by competent evidence, where the true 100th meridian was located." It thus appears that this court will not permit an inaccurate map to be accepted as a guide in the settlement of a boundary controversy, even when it is made a part of the convention or compact into which the parties have entered.

No one of the mass of maps, ancient and modern, offered in this case comes within the special exception discussed above, for the reason that *the acts to be construed make no reference to any map whatsoever*. Thus the whole mass falls under the general interdict pronounced by Sir Travers Twiss and Mr. Greenhow against the use of maps in boundary controversies, "as they are ordinarily made by persons wholly unacquainted with political affairs." When the entire inadequacy and inaccuracy of the earlier maps offered in this case are considered, it is easy to understand how such maps "have not unusually caused greater embarrassment to both parties in the subsequent attempt to reconcile them with the natural features, than the original question in dispute, to which they were supposed to have furnished a solution." The reason for that condition of things here is easy of explanation. Until very recently the islands within this disputed territory were of no value; they were an unexplored, unsurveyed, and uninhabited expanse, in which neither State took any special interest. It is not

therefore strange that the early cartographers were without data upon which to construct maps of the archipelago in question especially when we find on the Darby map (No. 20 and 20a), as late as 1816, the statement that the disputed territory "has never been surveyed N. E. of Bayou Terre aux Bœufs; the coast and interior remain, but imperfectly known. The surface is flat and but little elevated above the level of the sea." And yet it must be said to the honor of the early cartographers of this section that they were careful to declare, *on the face of their maps*, that they had no adequate data as to the topography of the region in dispute. For instance on the Dutch map (No. 9 and 9a), of 1766, which has for legend "*De Uitloop van de Rivier Mississippi,*" a line is drawn around the area occupied by the archipelago in question, and then at the side is printed, "*Ondiepte met verscheide kleine eilanden die weinig of niet bekend zyn*" (*Shallow water with many small islands which are little known.*) In the same way on the English map of 1775 (No. 10 and 10a), published by Thomas Jeffreys, Geographer to Her Majesty, and describing "The coast of West Florida and Louisiana," is printed in the same way at the side of the region in dispute—"*Shallow water with many small islands, but very little known.*" Again, on a map of the same date, taken from the same atlas of 1775 (No. 11 and 11a), describing the "Course of the Mississippi river from the Balise to Fort Chartres," as drawn on an expedition to the Illinois in the latter end of the year 1765, by Lieut. Ross of the 34th regiment, is printed in the same way, at the side of the region in dispute—"*Shallow water covered by many small islands which are but little*

known." Again, on the English copy of the Dutch map made by Isaac Tirion in 1766 (No. 12), first published in a periodical called the "London Magazine" and representing the course of "the River Mississippi from the sea to Bayagoulas," is printed in the same way, by the side of the line inclosing the area occupied by the archipelago,—"*Shallow water with many small islands very little known.*" The absurd inaccuracy of all these early maps in the location of even so prominent a feature as Lake Borgne is a cogent illustration of the fact that the term, "very little known," should have been applied to the larger bodies of water as well as to the more important divisions of the land. In juxtaposition with the foregoing statements, which appear in almost identical form upon the four maps described above, should be printed the confirmatory statement of complainant's witness, the eminent engineer, Major B. M. Harrod, who in describing the geological origin of the archipelago in question has said: "The river deposits being placed out *in a shallow sea* that had tidal movements and instead of forming a solid peninsula it left these open areas through it for the tidal movement in and out of Lake Borgne and Lake Pontchartrain and that those lakes or spaces of water have been enlarged since their formation, by subsidence." And so the testimony of the geologist that the islands in question were formed in "*a shallow sea*" is confirmed by the earlier cartographers who find "*Shallow water* with many small islands, which are little known," or "*Shallow water* covered by many small islands which are but little known." Thus geology and geography join hands in contributing a series of interlinked facts which no

ingenuity can be clever enough to break, no criticism sharp enough to sever—facts which declare that, from the very beginning, the islands in question, *formed as such in a shallow sea*, were never a part of the mainland of Louisiana.

If a few careless or ignorant cartographers, prior to a survey of these islands, have described the area occupied by them as a peninsula, the mistake, so common in the map-making of unexplored regions, is of no importance whatever. The fact is that no accurate or reliable maps of this region were ever made until the data for them were collected by the experts sent out by our Coast and Geodetic Survey. When upon such data accurate maps were at last constructed the fact that the region in question was occupied *by an archipelago of islands*, clearly and distinctly defined, was put beyond all questions. The larger islands such as Petit Pass Island, Racoon Islands, Little Racoon Island, Wild Goose Island, Deadman's Island, Mud Cross Islands, Crooked Islands, Mink Island, Shell Island, Brush Island, Door Point Island, Sundown Island, Pirate Island, Nigger Point Island, Elephant Point Island, Isle à Pitre, Martin Island, Mitchell Islands, and the larger bodies of water surrounding them, such as Nine Mile Bayou, Three Mile Bayou, South Bayou, Johnson's Bayou, Turkey Bayou, Drum Bayou, Grand Pass Bayou, Pierre, Elephant Bayou, Creole Gap, Jack Williams Bayou, Greque Bayou, Picnic Bayou, South West Pass, Door Point Bayou, Dead Man's Bayou, Oyster Bay, Bay Brodeau, Kirchunbs Bay, Cranetown Bay, India Mound Bay, and False Mouth Bayou are as well known in the geography of the region in question, *and are as distinctly named and defined on the maps describing*

it, as any other islands or bodies of water in that part of the world. How is it possible to maintain that this long list of islands, each with its well established geographical name and each surrounded by navigable tide water, in which craft of considerable size can sail, constitute a part of the mainland of Louisiana? Why should they ever have been designated as islands, by those best acquainted with them, if they are not such?

As heretofore pointed out, in connection with the testimony of Mr. Baylor, the Coast and Geodetic Survey "have accurate work on *trigonometrical methods* running back to about 1848," a date within 36 years of the admission of the State of Louisiana. That work puts beyond all question the fact that no material changes in the general physical aspects of the region have taken place since that time. When asked, "Has there been any change?" Mr. Baylor answered: "Yes, sir, there have been changes; in some places the shore has washed away, but to no great extent. Q. What would you call a great change? I believe a great change would be 300 or 400 feet. Q. What is the maximum change that you noticed in these points established by you? Well, I did not go into that question very closely; but I should not think, *I could safely say I did not find any change of over 300 feet* in 50 years." p. 416. If minute scientific investigation has thus established the fact that no material changes have taken place since 1848, there is certainly nothing in the evidence to justify the idea that any material changes have taken place in the character of the islands as such since 1812. The grotesque and unplausible theory that the archipelago

of islands, as it exists to-day, was formed, since 1812, out of the mainland of Louisiana by subsidence and the action of storms and tides is really too fanciful for serious discussion. It is unplausible for four reasons: first, because the geological origin of these islands as described by the experts produced by complainant crushes such a theory, Prof. Stubbs maintaining that the islands in question "have not been cut off; they have been formed by the waves and winds of the Gulf," and Major Harrod maintaining that they are the result of "the river deposits being placed out in a shallow sea that had tidal movements. * * * that water areas were left there when it was *originally formed*"; second, because the early cartographers recognized and noted the fact that the area in question was occupied by a body of small and unknown islands in shallow water; third, because the scientific investigations of the Coast and Geodetic Survey have settled the fact that no material changes in the general aspects of the territory in dispute have taken place in recent times; fourth, because the testimony of the geological experts demonstrates that if any such radical changes as complainant contends for ever took place, such changes must have been the work of hundreds, if not thousands of years of gradual transformation. In the light of the present controversy as to the title of the disputed territory between two sovereignties, it is hardly necessary to add that any mistake as to the merits of the legal questions involved made by recent cartographers, even by Col. Hardee, cannot be of the slightest importance. As Mr. Greenhow has well said such maps "are ordinarily

made by persons wholly unacquainted with political affairs." Mr. Edward H. Nall, the Land Commissioner, of Mississippi, in speaking upon the subject of the Hardee Map, said: "I don't believe any man has ever made a map of Mississippi or Louisiana that knew any more about the dividing line that is now in contention than we do about the burial place of Moses."

Mr. William Beer, of the Howard Memorial Library, of New Orleans, who furnished most of the maps put in evidence by complainant, and who was several times recalled, *on cross-examination* admitted their glaring imperfections and inconsistencies in no uncertain terms. For instance when asked (Record, p. 617), "I want to ask you to do us the kindness to examine the map of B. Lafon, 1806, and tell us what islands you find on that map within six leagues of the Mississippi shore. Let us begin at the mouth of Pearl River and travel eastward." He answered, "We have to begin by discussing, or by stating that this map is not necessarily correct. You are asking me now about a special distance which I can measure correctly. Now, it may so happen that that was not truly at that distance. This Lafon map is Lafon's presentation of the coast at that time. All I can say is that on Lafon's map as measured by the scale given on it, there are certain islands within six leagues, that is all I can say." Again when asked (Record, p. 793), "You had something to say this morning and heretofore, with reference to coloring. I will ask you in view of your qualifications, as an expert on these maps and on all other matters with reference to which you have qualified yourself, whether you give any

special significance to the geographers or map-makers, with reference to coloring of outlying islands?" He answered, "very little indeed." Any attempt made by any cartographer, since 1812, to determine by coloring to which sovereignty the area in question belongs, amounts to nothing more than a guess upon his part as to the manner in which this court will determine the issues involved here. As a general rule wherever a cartographer has made more than one map, he has guessed on both sides of the question. Even more frivolous is the claim that the archipelago in question must be considered a part of the mainland of Louisiana, because the area occupied by it is embraced within the region known since time immemorial as the "Louisiana Marshes," even before the State of Louisiana was admitted into the Union, and before the United States acquired the said territory, and while the southern part of Mississippi was also a part of the French territory known as Louisiana. If by virtue of that vague and general appelation, Louisiana can claim the area in question, then Florida can with equal right claim possession and sovereignty over the parishes of that State north of the River Iberville, because they are known as "Florida parishes."

XIII.

Practical Application of a Rule of Construction That Removes All Conflict Between the Acts in Question by Giving Effect to Every Provision of the Respective Grants.

There is nothing, even in complainant's evidence, to raise a doubt that the Congresses that defined the boundaries of Louisiana, Mississippi, and Alabama, saw the mainland of the first named separated from the islands in

question, just as we see that separation to-day; and the most conclusive evidence of the truth of that statement is to be found in the provision that Mississippi should possess all islands within *six leagues* (practically 18 miles), of her coast. If what defendant claims as islands were not such when her boundaries were defined, *at least one-half of the grant of islands to her has no subject-matter upon which to operate.* Congress might just as well have limited the grant to islands within *three leagues* of the Mississippi coast, if there were no islands beyond that limit. The fact that Congress attempted to grant to Mississippi all islands within eighteen miles of her coast is conclusive evidence *that that body considered the islands in question as such, and that they had not been previously granted to Louisiana.* Here the court should apply the rule laid down in Pollard *v.* Kibbe, 14 Pet., 366: "*It is not to be presumed that Congress would grant or even simply release the right of the United States to land confessedly before granted.*" The act of 1817, is an affirmative declaration by Congress that at its date the islands in question were such, and that they had never been previously granted to Louisiana. That Congress actually attempted to grant the islands to Mississippi the bill admits when, in par. 24, it avers that the elimination of the deep water channel theory "would cause the limits of the two States to *conflict and overlap.*" If Congress did not attempt to make the grant in question to Mississippi an overlapping would be impossible. And, if the islands in question are not such then the grant to Mississippi, beyond the nine-mile limit, must perish for want of subject-matter. *Thus the entire attempt made by Congress to com-*

pensate Mississippi for her narrow sea-front by giving her a zone of islands twice as wide as that granted to Louisiana would come to naught, because, forsooth, there were no islands within such wider zone upon which the grant could operate. Apart from reasons given already such a construction will be rejected under the rule that directs every court to strive to give effect to all the words of a grant *ut res magis valeat quam pereat.* In the construction of statutes as in the construction of deeds the cardinal rule is to effectuate, if possible, the entire intention of the grantor, and in ascertaining that intention regard must be had to the situation and the relative position of the parties, and the objects which they had in view. *Saunders* v. *Saunders*, 20 Ala., 710; *Strong* v. *Gregory*, 19 Ala., 146. No better statement of the rule can be found than the following: "In the construction of statutes one part must be construed by another; to collect the legislative intention the whole must be inspected. The Stafford Justices, Brock-R., 162, *and recourse may be had for this purpose to a proviso which has been repealed by a subsequent act. Bk. of Savings* v. *Collector*, 3 Wall., 495. Statutes are to be interpreted so as to give effect to all the words therein, if such interpretation be reasonable, and be neither repugnant to the provisions, nor inconsistent with the objects of the statute. *U. S.* v. *Bassett*, 2 Story R., 389. * * * *It is not to be presumed, that the legislature intended that any part of a statute should be without its proper meaning, force or effect.*" Potter's Dwarris on Stat. and Const., p. 188, note 8. The moment the court determines that the acts in question are *in pari materia*, then, under the rule laid down in *Alexander* v.

Alexandria, they "are to be construed together as forming one act." When that point is reached, "It is not to be presumed that the legislature intended that any part of a statute should be without its proper meaning, force, or effect." The grant to Mississippi of all islands within eighteen miles of her coast thus becomes, in contemplation of law, simply a *subsequent clause* in the act of 1812, admitting Louisiana. Nothing then remains but application of the following rule as defined in *Alexander* v. *Alexandria:* "If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used that sense is be adopted in constructing those phrases. Consequently, *if a subsequent act on the same subject* affords complete demonstration of the legislative sense of its own language the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to the courts in expounding the provisions of the law." Effect can thus be given to every part of the grant made by Congress to the two States in question, and all conflicts avoided, by the application of a settled rule of construction which directs courts, under such circumstances, to qualify the general terms first used in a statute by subsequent exceptions in modification of them. Thus Louisiana would take all islands within *three leagues* of her coast, *excepting such as are within six leagues of the coast of Mississippi.* If the grant made to Louisiana by the act of 1812, and that made to Mississippi by the act of 1817, were contained in a single statute, the grant to the former, appearing in the first section of such statute, and

the grant to the latter appearing in a subsequent section, would the court for a moment hesitate to limit the general terms of the first grant by the special terms of the second? Under the authorities, the fact that these grants are contained in separate statutes *in pari materia*, is a matter of no legal significance whatever.

XIV.

Louisiana's Claim of Title Under the Swamp and Overflowed Land Act of March 2, 1849.

By an act approved March 2, 1849, entitled "An Act to Aid the State of Louisiana in Draining the Swamp Lands Therein," it was provided that "to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be found or are found unfit for cultivation, shall be, and the same are hereby granted to that State." There is nothing in the act to give color to the idea suggested in par. 29, of the bill by the following unjustifiable statement: "The Congress of the United States, as well as the various departments of the United States Government, having authority in the premises, have themselves *recognized the boundary line contended for by the State of Louisiana*, by reason of the fact that the United States Government has *confirmed* to the State of Louisiana the lands composing Half Moon Island, etc." So far from there being the slightest foundation of truth for that suggestion the fact is that the act in question undertook to give to complainant as a donation certain lands which, *by her application for them, she admitted belonged, not to her, but to the United States.* The very improper

use of the word "confirmed" in this connection, as evidence of the recognition by the United States of the claim of complainant to the boundary in question, is too manifest to require argument, however much it may justify condemnation. Complainant can claim no benefit under the foregoing act, unless she can demonstrate, (1) that the United States was possessed of title to the territory in question on March 2, 1849; (2) that such act had or was intended to have application to these island lands which were not of the character contemplated in it. And yet despite the fact that the United States had, nearly forty years before, made an express grant of these islands to the State of Mississippi; and despite the fact that the lands composing them was neither "swamp nor overflowed" within the meaning of the act, complainant unlawfully attempted to acquire color of title to the same by making a pretended selection under the terms of said act. Under a misapprehension as to his authority in the premises, and while acting beyond the limits of his jurisdiction, the Secretary of the Interior undertook to approve such selections, and under and by virtue of such approval complainant claims title to said lands. After issuing a few patents to several individuals, such patents purporting to convey title to the Isle à Pitre, and after creating the Lake Borgne Basin Levee District by the act of 1892, complainant patented to said Board the residue, constituting the bulk of said lands. Since that time said Board has been going through the form of selling said lands at a nominal price (12½ cents per acre), to persons desiring them for fishing and oyster purposes, under deeds expressly excluding warranty in the following

terms written upon the face of said deeds: "It is distinctly understood by the parties hereto that the Board of Commissioners for the Lake Borgne Basin Levee District, through their said president, transfer, assign, and set over, only those rights and interests which the said Board now have in and to the aforesaid lands, giving hereby simply a quit claim, and making and giving no warranty whatsoever; *and further, that should the said title be subsequently declared void, the said Board shall not reimburse to the purchaser any sum whatever.*" Record, p. 1088; Doc. No. 59. A more emphatic declaration could hardly have been made of the flimsiness of the pretended claim of complainant under the act in question—a claim whose invalidity will be demonstrated on three distinct grounds, either of which is conclusive against it.

In the first place if defendant's contention is sound that the islands in question were conveyed to her by an express grant upon her admission to the Union in 1817, then the subsequent Act of March 2, 1849, purporting to donate certain swamp and overflowed lands to complainant can have no possible operation for the simple reason that the United States had, at the date of said act, neither title nor interest. Grants made by a legislature are not warranties; and if the thing granted was not in the grantor at the time of the grant, no estate passes to her grantee. *Rice* v. *Minn. & N. W. R. R. Co.*, 1 Black, 358; *Polk* v. *Wendal*, 9 Cranch, 87. If that be true, then the *ex parte* proceeding of the Secretary of the Interior in 1852, was simply null and void as an attempt to take away a part of the domain of a State without the consent of its legis-

lature. Art. IV, Sec. 3, of the Const. In *Stone* v. *United States*, 2 Wall., 525, involving the validity of acts of the Secretary of the Interior under like circumstances, it was held that where land claimed never was within the tract alloted to the Delaware Indians, but was within the limits of a reservation legally made by the President for military purposes, the patents issued therefor were void because the Secretary exceeded his authority. In the second place, the act in question could not be applied to the lands of which these islands were composed, because they were not "swamp and overflowed lands," within its meaning, nor in any way connected with the levee system it was designed to promote. It was long ago settled that lands subject "to periodical overflow" are not "swamp and overflowed," that term applying only "to those lands which are overflowed and will remain so without reclamation or drainage." The phrase "subject to periodical overflow" has reference to a condition, which may or may not exist, and which when it does exist is of a temporary character. *Heath* v. *Wallace*, 138 U. S., 573. In that case it was firmly settled that lands described as "subject to periodical overflow" cannot be certified as "swamp lands." Complainant's own evidence puts the fact beyond question that, under normal conditions, the islands in dispute are never under water; only during storms or phenomenal tides does the water sweep over them. The well known expedition of Monier and Thiel was made, at complainant's instance, to demonstrate that fact; and complainant's witness Louis Cucullu, a member of the City Council of New Orleans and President of the People's Bank of that city, who

has known the region in dispute from infancy,' was careful to say (Record, p. 977); "all along the shore of Lake Borgne and the Gulf, *those marshes are always above water*, and it takes a high tide to cover most of those marshes." Theil said: "I don't say it don't, *it overflows sometimes*, in storms it will be overflowed like anywhere else." On her own evidence complainant can only claim that the islands are "subject to periodical overflow," and that settles the fact that they were never within the purview of the act in question—the term *swamp* having no possible application to lands of the character of those composing these islands. If an appeal be made to the doctrine that decisions of the Secretary of the Interior upon matters of fact, *within his jurisdiction*, are, in the absence of fraud or imposition, conclusive (*Heath* v. *Wallace*, 188 U. S., p. 573), the answer is that in this case he was entirely *without jurisdiction*, as the title to the lands in question had long before been vested in the State of Mississippi, by a definite and specific grant from the United States, a grant made of the islands as such regardless of the character of the lands that composed them. In the third place, the Secretary of the Interior was entirely without jurisdiction, because the clear and definite purpose of the act in question was "to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein." Thus by this and subsequent acts of a like character a certain class of lands situated in the States adjacent to the banks of the Mississippi River were given for the building of levees and drains for the purpose of their reclamation. The lands in dispute were not only

not of the class known as "swamp and overflowed," but they were in a district apart to which the levee system could not be extended, and to which it had no application. The subject-matter was not, therefore, drawn, either by the letter or spirit of the Swamp and Overflow Land Acts, within the Secretary of the Interior's jurisdiction. It is not, therefore, strange, under such circumstances, that ordinary prudence should have prompted the Board of Commissioners for the Lake Borgne Basin Levee District to declare on the face of their quit-claim deeds, "that should the said title be subsequently declared void, the said Board shall not reimburse to the purchaser any sum whatever." This aspect of the case is not worthy of serious consideration save so far as it goes to show that the authorities of Louisiana, by seeking to acquire color of title to the islands in question, by an appeal to the Swamp and Overflowed Land Acts, were convinced that that State possessed no title to them, under the act of April 6th, 1812, admitting her into the Union. If these islands did pass to Mississippi, under the act of 1817, admitting her into the Union, of course she could not be divested of title to them under a proceeding to which she was not a party had before a ministerial officer.

The Claim of Acquiescence.

No part of the case stated by complainant is more vague and shadowy than that in which the claim of acquiescence is embodied, if such a claim, upon the allegations of the bill, can be said to have been made at all. If the

pleadings actually present it, it can only be inferred from the following statements which contain all that has been alleged concerning it: "Your orator further avers that where contiguous states or countries are separated by water it is, and always has been the *custom* to regard the *channel* as establishing the boundary line of such states, and that the State of Mississippi has itself recognized this principle in the description of its territorial limits as found in the second article of its own constitution, adopted November, 1890, in the following words (par. 28th), * * * 29th. Your orator avers that as heretofore stated the Congress of the United States, as well as the various departments of the United States Government, having authority in the premises have themselves recognized the boundary line contended for by the State of Louisiana, by reason of the fact that the United States Government has confirmed to the State of Louisiana, the lands composing Half Moon Island, which is just south of the deep water channel, and which is composed of section 36, etc. * * * in the aforesaid land district, and parts of which are claimed by the State of Mississippi under its right angle line to belong to the State of Mississippi, have in fact been also confirmed to the State of Louisiana, by the United States Government, and are recognized as belonging to and forming part of the State of Louisiana by the said United States Government *and have always heretofore been so recognized by the people of the said two States.*" Defendant's counsel trust that they have successfully demonstrated two propositions: first, that the fanciful theory that international law can extend the deepest channel of a river, generally known as the thalweg,

beyond its estuaries into the open waters of the sea is entirely unsupported either by reason or authority; second, that the pretension that a State can win a recognition from the Government of the United States of its view of a boundary controversy by obtaining from such Government, *through an illegal proceeding admitting its entire lack of title*, an invalid donation of certain lands as swamp and overflowed, which were not such, is too destitute even of plausibility to justify its presentation here. If that demonstration has been successful, then nothing remains of complainant's claim of acquiescence except the general and concluding allegation: "and have always heretofore been so recognized by the people of the said two States." In defining the elements, which constitute acquiescence in a boundary controversy between States, this Court, in *Indiana* v. *Kentucky*, 136, N. S., 479, has said: "Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island* v. *Massachusetts*, 45 How., 591, 639, this Court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the Colonies, said: 'Surely this connected with the lapse of time, must remove all doubts

as to the right of the respondent under the agreements of 1711 and 1718.' " In that case this court held, in 1841, that the time necessary to operate as a bar in equity is fixed at twenty years; but where two political communities are concerned, *and the boundary in question was in a wild, unsettled country*, such a rule of limitation would not apply 15 Pet., 233. It is not pretended that in the "wild, and unsettled country" involved herein, complainant has ever exercised actual physical sovereignty and jurisdiction; and nothing is more notable in the testimony offered in her behalf that the absence of proof of acts which might be held to constitute a constructive exercise of sovereignty and jurisdiction. So far as the coast is concerned from the Rigolets eastward, the State of Louisiana has never asserted sovereignty or jurisdiction, by legislative act or otherwise, from her admission into the Union down to about 1900. The origin of complainant's claim to rights in that locality is thus stated in the bill: "9th. Now your orator avers that there has developed in *recent years* in the waters south of the State of Mississippi, and east of the southern portion of the State of Louisiana a considerable growth of oysters, and an industry of large proportions, in the handling of the said bivalves, either in their fresh or in a canned condition, has resulted therefrom; 10th. That the State of Mississippi has, by legislative enactments, regulated the oyster industry in the waters of said State, and *permits* the dredging of oysters on the natural oyster reefs in waters of the said State, as will more fully appear from the statutes of said State to which reference is made; 11th. That the State of Louisiana has by legislative enactments regulated

the oyster industry in the said State of Louisiana, and *prohibits* the dredging of oysters on the natural reefs in the waters of said State, as will more fully appear from the statutes of said State to which reference is made. 12th. That the provisions of the laws of the said two States differ considerably in many other respects." The acts of the respective States thus referred to show that said difference has resulted from a conflict between an act passed by the legislature of Mississippi *in 1896*, and an act passed by the legislature of Louisiana *in 1902*. Nothing can more clearly illustrate how very recent has been the assertion of sovereignty and jurisdiction upon the part of Louisiana in the area above described.

The assertion of sovereignty and jurisdiction upon the part of Mississippi over the entire region in dispute should be dated from its annexation to the Mississippi Territory, by the act of Congress approved May 14, 1812 (U. S. Stat. at L., Vol. 11, p. 734), just one month after the admission of Louisiana into the Union. That act provides "That all that portion of territory lying east of Pearl River, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby annexed to the Mississippi Territory; to be governed by the laws now in force therein, or which may hereafter be enacted." On August 1st, 1812, the Governor of the Mississippi Territory under the authority of said act erected the area so annexed into a county known as the County of Mobile, from which a representative was to be elected to the territorial legislature. On December 14th, 1812, that legislature carved out of the said county of Mobile, the counties of Jackson and

Hancock, and in 1841, the legislature of Mississippi created out of parts of said counties the county of Harrison. As early as 1821, John Baker and Martin Hogan were convicted and sentenced to death in the Superior Court of Hancock County "for robbery committed *in the Gulf of Mexico, within the boundary of this State*"; and the Legislature of Mississippi, in an act passed in November of that year, awarded to John Quavre $200 "for having detected and delivered to justice, John Baker and Martin Hogan, for a robbery committed *in the Gulf of Mexico, within this State.*" Record, p. 2131. On the 29th of October, 1886, an inquest was held by the authorities of Harrison County upon the body of John Kennedy, who was drowned south of the Cat Island Channel, and whose body was found in Creole Gap, which is one of the interior waters of the Isle à Pitre. Record, pp. 1897–1904. In 1893, F. P. Lizana, constable and deputy sheriff of Harrison County, appointed by the Board of Supervisors to see that licenses were obeyed for fishing oysters, and to see that oysters were properly culled—his office being called "oyster inspector," it being his duty to exercise his functions within "18 miles. Supposed to be six leagues from the shore"—arrested John Bowen "between Grand Pass and Sundown Island, but more towards Grand Pass," for violating the oyster laws of Mississippi. Record, pp. 1509, 1510. That he was so arrested at that place Bowen admits. p. 1501. In 1830, the legislature of Mississippi enacted "That the south boundaries of the counties of Hancock and Jackson be, and they are hereby, extended to the south boundary of this State" (Record, p. 2118); and in 1842, said legislature

enacted, "That the county of Harrison shall be bounded on the south by the southern boundary of the State of Mississippi." Record, p. 1889. In 1839, the Mississippi Legislature passed an act providing for a survey of the "whole sea coast on the southern boundary of this State." Record, p. 2120. In 1842, said legislature requested Congress to make a "sufficient appropriation for the erection of a light-house on St. Joseph's, sometimes called Half Moon Island, situated in Lake Borgne, and lying between the mouth of Pearl River and the Bay of St. Louis" (Record, p. 2124); and at the same session said legislature consented that the United States "purchase a site on St. Joseph's, or Half Moon Island, for the purpose of erecting a light-house thereon" (Record, p. 2105). In 1843, said legislature began to protect the oyster industry by the passage of "An act to prevent the destruction of oysters in the waters of the State of Mississippi." Record, p. 1956. In 1856, said legislature passed a law entitled "An act for the preservation of game and oysters in this State, which act gives to the board of police of the three coast counties full jurisdiction to protect and preserve oysters and game within said counties. Record, p. 1958. In 1857, said Legislature enacted that "the counties bordering on the Gulf of Mexico—to wit: Jackson, Harrison, and Hancock—shall, respectively have and possess jurisdiction and extend to the southern boundary of the State within the space embraced by extending their boundary lines which strike *the Gulf of Mexico*, or the inlets thereto, on a continuous direct course to the southern boundary of the State, including all islands that may lie within the limits thus defined."

The substance of that act was embodied in the Rev. Statutes of said State of 1871, 1880, and 1892. Record, pp. 86–87. It has been settled by this Court that "Within what are recognized by the law of nations as the territorial limits of states, a state can define its boundaries on the sea and the boundaries of its counties. Massachusetts can include Buzzard's Bay, the headlands of which are less than two marine leagues apart, within the limits of its counties." *Manchester* v. *Massachusetts*, 139 U. S., 240. In the exercise of that right Mississippi did, by affirmative legislation of the most specific character, redefine in 1857, the boundaries of her three coast counties in such a manner as to include with greater minuteness of description than ever before, every foot of the territory in dispute. Her jurisdiction and sovereignty thus affirmatively asserted has ever since been maintained. And laws of like tenor and effect were passed in the years 1871, 1880, 1884, 1886, 1888, 1890, 1892, 1896, and 1902. Record, pp. 1960–1979. It has been held by this Court in *Indiana* v. *Kentucky*, 136 U. S., 479, that the enactment of legislation by a State for the assertion of its sovereignty and jurisdiction, and the taking of judicial action for the same purpose, is such affirmative action as should be taken to that end. Or, as this Court has expressed it, "Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim and a general acquiesce in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the law, declaring the boundaries of her counties on the Ohio River, passed in January, 1810; there was action

taken in the courts of the United States, and of the State by parties claiming under her, or her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction." When tested by that standard it appears that Mississippi, from her territorial days down to the present time, has been diligently asserting her rights of sovereignty and jurisdiction over the region now in dispute by all available means, legislative, executive, and judicial, while, on the other hand, it appears that Louisiana has done practically nothing, either by legislation or by the action of her judicial authority, to assert her sovereignty and jurisdiction prior to the enactment, as alleged in her bill, "*in recent years*," of certain laws for the regulation of "the oyster industry in the waters of said State." It may be worthy of mention here that Mississippi has also asserted her sovereignty and jurisdiction over the area in question, by ordinances adopted by her three coast counties regulating the taking of fish and oysters within the waters of said counties as heretofore defined, and in the ordinances of the boards of health of said counties, and in her pilot and harbor laws, co-extensive in point of time, with other legislation discussed above. Record, pp. 1905–2018.

The testimony as to the belief and claim of Mississippians that the possession, sovereignty, and jurisdiction of their State extends six leagues from her shore, covering all the territory in dispute, is absolutely overwhelming. It is based upon the actual judicial exercise of authority as demonstrated by the Baker and Hogan robbery cases

of 1821, by the Kennedy inquest of 1886, by the enforcement of the oyster laws, and by other acts of said State, as in the arrest of Bowen near Sundown Island, as well as by the unmolested enjoyment of the territory by thousands of fishermen for more than fifty years. Indeed it may be stated with certainty that at least sixty of the seventy-seven witnesses called by Mississippi sustain this statement. In that number are included governors, judges, district attorneys, sheriffs, clerks, mayors, justices of the peace, constables, and all classes of citizens along the coast from capitalists to the poorest tongmen. An illustration of the firm belief in the claim to such rights may be found in the following extract from the testimony of H. Heidenheim, Rec., p. 1692: "In 1885 our company organized a factory here (canning, at Biloxi), and we conferred with counsel in Jackson, Mississippi, and Gen. Joseph Davis, who was our counsel here, and before we invested money in that corporation as business people, it was necessary to be governed by intelligent legal advice, and we were advised at that time that the Mississippi boundary line was as it reads in that statute and as it was made by Congress, otherwise we would never have come here with this question hanging over us, with a doubt of getting it settled right and investing $75,000, or $100,000." At p. 1707, he says: "Well now, to give you some idea what the loss would be; when I came here Biloxi (18½ years ago) had 1,200 population, and to-day she has 7,500, or 8,000. The other places on the sea shore have equally grown directly or indirectly by this industry. The industry is in its infancy and in my opinion if we consider time, depreciation of real

estate, and other commercial conditions that now exist, that would be disturbed in the present and future that I could safely say the losses would be over $100,000,000.00, in the space of not over 25 years. * * * that is if you exclude that territory, that is the loss that would result." p. 1708. The following is the testimony upon this subject of complainant's witness, Wm. K. M. Dukate, manufacturer of canned products, as drawn from him on cross-examination. "Q. I want to ask you first, this question, whether you and other persons interested in the oyster and fishing industry from Biloxi and other points on the Mississippi shore, have regarded the sovereignty and jurisdiction of the State of Mississippi as extending 18 miles from her shore as indicated by the red lines on this map, and if so how long you have regarded the rights of the people of Mississippi and the jurisdiction and sovereignty of Mississippi to that extent? A. *We have always regarded the boundary of the State of Mississippi as reaching six leagues, or 18 miles from the shore, including all islands as indicated by the boundaries as mentioned in the Code of Mississippi.* Q. And so regarding that limit, have you, and other Mississippians exercised the rights granted under the laws of that State within the territory indicated on the map as belonging to that State? A. I believe that we have. Whenever the question has been brought up. I will state, however, that there has been never any molestation on the part of either State until I think the past two or three years." Record, p. 376. No more conclusive answer can be given to the pretension set up in the bill that the line as claimed therein has "always heretofore

been so recognized by the people of the said two States," than that embodied in the replies of Mr. Ducate, while testifying in complainant's behalf, and in those of many witnesses for the defendant.

XVI.

Summary.

If the arguments contained in the two preceding sections have demonstrated, first, that complainant derived no title to the region in dispute from invalid proceedings under a swamp land act, having no application to lands not of that character, and which, at its date, did not belong to the United States; second, that so far from defendant ever having acquiesced in the claim asserted by the bill, she has continually contested it through all the agencies of government, legislative, executive and judicial—then the Court has before it, *unembarrassed by subsequent events*, the merits of the original controversy as they arise upon the face of the acts now presented for interpretation. As the burden is upon complainant to make out her case as stated in the bill the fact cannot be lost sight of that the foundations of it are, first, the *contention of law* that a water boundary is defined by international law between the two States in the open waters of the Gulf of Mexico, because as complainant says, "it is, and always has been, the *custom* to regard the *channel* as establishing the boundary line of such States"; second, *the contention of fact* that the islands in question were in 1812, a part of her mainland. If, as defendant confidently claims, both foundations have

entirely given way, in what attitude does the case now stand before the court? Certainly upon the issues presented by defendant's cross-bill, which prays for affirmative relief upon the case made by it. Apprehending that result, no doubt, complainant has taken the precaution to state her case in the alternative, as follows: "27th. * * * *but if your honors should feel that any part of this disputed area was* ISLANDS *by reason of the presence of shallow water, then* AS ISLANDS *they are within the nine-mile limit of distance from the shore line of the State of Louisiana, and therefore belong to and form part of the State of Louisiana by that second prevision of the act of Congress, giving Louisiana all islands within three leagues of its shore line.*" In par. 24, complainant had alleged "that any other boundary than the *deep water channel* as aforesaid would cause the limits of the two States to *conflict and overlap.*" In no possible aspect of the case can the Court listen to the suggestion made by complainant in her answer to the cross-bill in the following terms: "Repliant further, especially and particularly denies that the limits of the State of Louisiana are to be defined and determined from the 'mainland' of said State, as claimed by respondent, but are to be defined, determined, and delimited from the islands, as the 'coast' of the State of Louisiana." The only merit in this suggestion is contained in the admissions that the "islands" exist as such separate and apart from the "coast." Assuming that the deep water channel theory has perished and passed out of the case as an impossible expedient, then the real and only issue that remains is this: Will this Court, construing the conflicting acts, *in pari materia*, so reconcile

them as to carry out the cardinal purpose of Congress, which evidently was to do equity and justice between these States, by giving to each the islands directly in front of it, and at the same time prevent any *overlapping*. To Mississippi was given all islands within *six leagues of her sea-front*, as some compensation for the great inequality arising out of the possession by Louisiana, of a coast line nearly six times as long as her own. Because of that advantage Louisiana was only given islands within *three leagues of her coast*. The effort of Congress thus to do something like equity and justice will be entirely broken down, if this Court so construes the acts in question as to give to Louisiana islands on her eastern coast, which extend about one-half of the way across the narrow sea-front of Mississippi. This argument must therefore end as it began with the contention "that, where a particular construction of a statute will occasion great inconvenience *or produce inequality and injustice*, that view is to be avoided if another and more reasonable interpretation is present in the statute." *Knowlton* v. *Moore*, 178 U. S., p. 77. The moment the Court determines that the acts in question are *in pari materia*, it follows, as a matter of law, that they "are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. *Consequently, if a subsequent act on the same subject* [passed seventeen years after the first], *affords complete demonstration of the legislative sense of its own language, the rule which has been*

stated, requiring that the subsequent should be incorporated in the foregoing act, is a direction to the courts in expounding the provisions of the law." Marshall, C. J., in *Alexander* v. *Alexandria*, 5 Cranch, p. 8. If in obedience to that rule, here defined and never questioned, this Court will simply "incorporate" the provisions as to boundaries contained in "the subsequent" act of 1817, into the provisions on the same subject contained in "the foregoing act," of 1812, all conflict will be removed by the recognition of the grant in favor of Mississippi [*thence westwardly, including all islands within six leagues of the shore to the most southern junction of Pearl River with Lake Borgne*], as *a limitation* upon the general terms of the prior act. Such a method of construction so firmly applied in *Alexander* v. *Alexandria*, was confirmed in *United States* v. *Kirby*, 7 Wall., 482, wherein it was said: "All laws should receive a sensible construction. General terms should be so *limited* in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the Legislature intended *exceptions* to its language, which would avoid results of this character. The reason of the law, in such cases should prevail over its letter." The court is thus authorized to give effect to the reason of the two statutes construed together as one law, by simply holding that the "general terms" of the first are to "be so limited in their application as not to lead to injustice, oppression, or absurd consequence," which would result if they were permitted to annul or abridge the grant to Mississippi, in the second of "all islands within six leagues of the shore to the most southern junction of Pearl River

with Lake Borgne." Complainant's bill clearly admits, a matter of law, that it was the intention of Congress give that area to Mississippi, when it says that the elimin tion of the deep water channel theory "*would cause t limits of the two States to conflict and overlap.*" Par. 2 The ultimate question, therefore, is this: How can th Court give effect to the grant to Mississippi, so as not cause "the limits of the two States to conflict and ove lap?" The adoption of the construction contended f would render impossible all conflict and overlapping, a would leave Louisiana, with her mainland untouched, full possession of her southern and eastern coast line wi all islands within three leagues thereof, excepting only t small group within six leagues of the narrow sea-front Mississippi. The only objection which Louisiana urges, can urge, against this rule of construction is that her a is prior in date, an objection which loses all legal signi cance the moment the *in pari materia* method is adopte for the conclusive reason that that method *eliminates d dates* by providing that all acts "are to be construe together as forming one act." By that method provisio of subsequent statutes are "incorporated into the for going act," and become a part of it, *just as if they were incorporated at its enactment.* Otherwise the method wou have no efficacy whatever. Under that method of co struction the court must presume that when it enacted t statute of 1812, Congress *intended* that its *general ter be limited by the special provisions of the statute of* 181 Therefore it cannot be said that the subsequent act impa the grant made in the preceding because, in legal conte

plation, *no such prior grant was ever made*, Congress never having had such an intention.

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